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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5741

WAYNE EUGENE RITTER, PETITIONER,

V.

STATE OF ALABAMA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No._____

WAYNE EUGENE RITTER, PETITIONER

v.

STATE OF ALABAMA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

The petitioner Wayne Eugene Ritter respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Alabama Supreme Court entered in this proceeding on July 6, 1979.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals in Evans and Ritter v. State, reported at 361 So.2d 654 (Ala. Cr. App. 1977) appears attached hereto as Exhibit B. The opinion of the Alabama Supreme Court in Evans and Ritter v. State, reported at 361 So.2d 666 (Ala. 1978) appears attached hereto as Exhibit C. The opinion of the Alabama Court of Criminal Appeals in Ritter v. State, reported at 375 So.2d 266 (Ala. Cr. App. 1978) appears attached hereto as Exhibit D. The opinion of the Alabama Supreme Court in Ritter v. State, reported at 375 So.2d 270 (Ala. 1979) appears attached hereto as Exhibit A, infra.

JURISDICTION

The final judgment of the Alabama Supreme Court was entered on July 6, 1979. A timely petition for rehearing was denied on September 7, 1979, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

(1) Whether petitioner's death sentence deprives him of life without due process of law, or denied him the equal protection of the laws, in violation of the fourteenth amendment, or constitutes cruel and unusual punishment in violation of the eighth amendment, because it was imposed pursuant to Alabama's post-Furman, pre-Gregg enactment governing capital prosecution and sentencing, which has the following features:

(a) Lesser included offenses, although supported by the evidence, cannot be submitted to the jury in a criminal prosecution, with the result that the jury must either convict the defendant of the capital crime or acquit him altogether;

(b) Juries in capital cases are compelled to impose a death sentence upon every defendant found guilty of a capital crime without considering mitigating circumstances;

(c) The defendant's only outlet from this mandatory jury-fixed death sentence lies in the power of the trial judge to "refuse to accept the death penalty as fixed by the jury" after conducting a post-verdict hearing and considering, inter alia, "the fixing of the punishment at death by the jury."

(d) The provisions for appellate review do not empower appellate courts to vacate disproportional or excessive death sentences, and systematic comparative review in fact is not being performed.

(e) The various elements of this statute operate in tandem to compound its constitutional flaws.

(2) Whether the failure to the trial judge to charge the jury on the elements of robbery, an essential ingredient of the capital offense for which petitioner was convicted and sentenced to death, denied him due process of law.

STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the provisions of Alabama's death penalty statute, Ala. Code § 13-11-1 et seq. (1975) which are reproduced in Appendix E.

STATEMENT OF THE CASE

Petitioner, along with a co-defendant John Louis Evans, was indicted under Alabama's 1975 death penalty statute for the first degree murder of Edward Nasser during the commission of the robbery. Prior to trial, petitioner made several attempts to enter a plea of guilty. However, because of the procedure mandated by state law, a jury was impanelled to determine the issue of guilt or innocence and, upon a finding of guilt, to sentence the defendant to death. See Prothro v. State, 370 So.2d 740 (Ala. Cr. App. (1979). At trial, petitioner freely admitted his participation in the robbery homicide and asked that the jury sentence him to die in the electric chair. The judge charged the jury on the elements of murder, (R. 223-225) but simply failed to instruct the jury as to the elements of the crime of robbery. (App. A, p. 6). No objection to the charge was made. In his charge, however, the court cautioned "you may not take the simple approach and say, if the defendant admits he did it, we go no further." (R. 223). After deliberating for fifteen minutes, the jury convicted petitioner and his co-defendant and sentenced them to death.

The post-jury verdict hearing, required by Alabama law, was held the next day. The court upheld the jury imposed sentence of death finding that

> The aggravating circumstances far outweigh the mitigating circumstances and that the death penalty as fixed by the jury should be and is hereby accepted.

(R. 246).

Under the Alabama Automatic Appeal Statute, Ala. Code § 12-22-241 (1975), see Boykin v. Alabama, 395 U.S. 238 (1969),

petitioner, through appointed counsel, challenged the constitutional validity of the Alabama death penalty law. On October 25, 1977, the Alabama Court of Criminal Appeals rejected petitioner's constitutional challenge and affirmed the conviction and death sentence of both petitioner and his co-defendant. (App. B, infra, p. 9). The Alabama Supreme Court, with Justice Jones and Shores dissenting, also rejected petitioner's constitutional attack on the authority of its opinion in Jacobs v. State, 361 So.2d 640 (Ala. 1978), cert. denied, U.S. (1979), (App. C, infra, p. 2), but remanded petitioner's case to the Court of Criminal Appeals for a determination of whether the statutorily reuqied "intent to kill" had been erroneously supplied by the felony murder doctrine.[1/] On August 9, 1978, the Alabama Court of Criminal Appeals again affirmed petitioner's conviction and sentence of death finding that the petitioner's "active participation in the Nassar murder supplies the requisite intent for an intentional killing" required by the law. (App. D, infra, p. 2). The court also rejected petitioner's renewed constitutional challenge to the death penalty law.

On July 6, 1979, the Alabama Supreme Court affirmed the decision of the Alabama Court of Criminal Appeals on the intent issue. The Court also ruled that the trial judge's failure to charge the jury on the elements of robbery was error without injury and further that whatever error occurred had been waived. (App. A, infra, p. 7). A timely application for rehearing was denied without opinion on September 7, 1979.

1/ Ala. Code, § 13-11-2(b) (1975) states that "Evidence of intent . . . shall not be supplied by the felony murder doctrine.

HOW THE FEDERAL CONSTITUTIONAL ISSUES WERE RAISED AND DECIDED BELOW

Petitioner's federal constitutional challenges to the Alabama death penalty law were briefed and argued before the Alabama Court of Criminal Appeals and before the Alabama Supreme Court. Both courts rejected the arguments on the authority of Jacobs v. State, 361 So.2d 640 (Ala. 1978), cert. denied, ___U.S.___ (1979). See App. B, infra, p. 9; App. C, infra, p. 2 and App. D, infra, p. 3). Petitioner's specific contention concerning the failure of the trial judge to charge the jury on the elements of robbery (Question presented II) was raised at petitioner's second hearing before the Alabama Supreme Court and denied. (App. A, infra, p. 7).

REASONS FOR GRANTING THE WRIT

I. Alabama's Statutory Death-Sentencing Procedure Raises Substantial and Literally Vital Federal Constitutional Questions, For Its Provisions Are Inconsistent With the Applicable Capital Punishment Decisions of This Court.

A. Alabama's Unique Statutory Prohibition, Which Precludes Juries In Capital Cases From Considering Factually Supported Lesser Included Offenses Raises Substantial Questions Under the Due Process and Equal Protection Clauses and the Eighth Amendment.

The submission to the jury of lesser included offenses that are supported by the evidence is a commonplace of American criminal jurisprudence. Alabama's criminal law is not exception. As a general principle, Alabama permits a jury to find a criminal defendant guilty of any lesser degree of, or any offense necessarily included in, the crime with which he is charged. Ala. Code, § 13-17-1 (1975). This principle is extremely vital in the realm of murder where, by statute, an Alabama court is required in every case to charge on both first and second degree murder.[2/]

2/ Under Alabama law, first degree murder is "wilful, deliberate, malicious and premeditated killing." All other common law murder is murder in the second degree. Ala. Code § 13-1-70 (1975). A person convicted of first degree murder is automatically sentenced to life in prison while a person convicted of second degree murder is sentenced, at the discretion of the jury, to a term of imprisonment of not less than 10 years. Ala. Code, § 13-1-74 (1975).

Ala. Code, § 13-1-73 (1975). The court is required to charge on other lesser degress of homicide "if there is any reasonable theory from the evidence which would support the position." Fulghum v. State, 291 Ala. 7, 277 So.2d 886 (1973).[3/]

As this Court is aware, however, the Alabama death penalty statute expressly precludes the trial jury from considering lesser included offenses that can factually be found in a capital case. Ala. Code, § 13-11-2(a) (1975). It thereby foists upon a jury that believes that the defendant has committed some degree of criminally culpable homicide -- but not capital homicide -- the Hobson's choice of acquitting a killer or convicting and subjecting to death an individual who is not guilty beyond a reasonable doubt of the only crime on which the jury can render a verdict.

Aside from the quandary in which it places juries, the most striking feature of the lesser included offense provision of Alabama's capital statute is its uniqueness -- not only to Alabama law, but also to the criminal law of the remaining 49 states and the federal government.

This Court has recently granted certiorari to review the constitutionality of this feature of the Alabama death penalty statute. The question to be decided in Beck v. Alabama, 365 So.2d 1006 (Ala. 1978), cert. granted, 26 Cr.L. 4052 (October 9, 1979), appears to present an as-applied issue, the constitutionality of the operation of this statute where the evidence would have supported a verdict on a lesser-included offense.

The concerns which justified grant of certiorari on the as-applied issue, however, equally justify grant of certiorari to consider whether the preclusion of lesser-included-offense charges results in the facial invalidity of this statute. The

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3/ In Alabama, the other degress of homicide are manslaughter in the first degree and manslaughter in the second degree. Ala. Code, § 13-1-90 (1975). Whether a homicide amounts to murder in the first degree, murder in the second degree, manslaughter or self-defense "is always a question of fact for the jury, under proper instructions of the court." Warren v. State, 197 Ala. 313, 72 So. 624 (1916).

reasons for entertaining a facial attack on the statute can best be stated after a brief review of the constitutional flaws of this aspect of Alabama's statute.

1. The Due Process Violation.

Perhaps most saliently, the statute violates due process of law, by undermining the constitutional guarantee of proof beyond a reasonable doubt. The requirement that a state not impose criminal sanctions unless it has proved every element of the charged offense beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970), is so basic that it is common knowledge among the people of the United States. Indeed the centrality of the "beyond a reasonable doubt" standard to criminal jurisprudence was recognized by the Supreme Court twice last term. Jackson v. Virginia, 99 S. Ct. 2781, 2787 (1979); Addington v. Texas, 99 S.Ct. 1804, 1808 (1979). In preventing juries from returning verdicts on lesser included offenses, the Alabama capital punishment statute denigrates the "vital role" played by the standard of proof beyond a reasonable doubt by encouraging juries to convict in spite of it. Concomitantly, the statute reduces the "risk of error" that should be borne by society by placing it squarely on the shoulders of capital defendants.

It takes no more than the most cursory knowledge of human behavior to apprehend the constitutionally precarious dilemma into which a significant number of Alabama capital juries must inevitably be thrust by their statutory inability to return a verdict on a lesser included offense. A jury that possesses a reasonable doubt as to one of the elements of the offense charged, but no doubt as to the defendant's guilt of a lesser offense that does not require proof of the questioned element, is likely, if precluded from convicting of the lesser offense, to resolve its doubts in favor of conviction of the greater. This is precisely why virtually every American jurisdiction entitles a defendant to request a lesser included offense instruction if there is any evidence to support it. In the context of a murder trial, the natural human revulsion

to all homicides only serves to heighten a jury's disinclination to declare an individual it believes has unjustifiably killed "not guilty."

Were common sense and simple logic not sufficient to compel this conclusion, this Court's judgment confirming it and Alabama's own experience in administering its death penalty statute certainly are. In Keeble v. United States, 412 U.S. 205 (1973), the court overturned a trial court's interpretation of a statutory system, which had precluded the giving of a jury instruction on a lesser included offense. Holding that this system, the federal Major Crimes Act, could not be construed to preclude a lesser offense instruction, the Court reasoned that a contrary construction would raise difficult constitutional questions. Id. at 213. It would expose defendants to a substantial risk of unwarranted conviction:

> True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

Id. at 212-213 (emphasis in original).[4/]

Alabama's experience administering its capital punishment statute confirms that the Supreme Court's concern over the intolerable pressure brought to bear on a jury powerless to convict of a lesser offense was not unfounded. Since the effective date of the Alabama statute, the resulting conviction rate has

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4/ The lower courts have also recognized that foreclosure of a lesser offense instruction, where otherwise appropriate, jeopardizes a defendant's fundamental right to fair jury fact-finding. See, e.g., United States v. Tsanas, 572 F.2d 340, 346 (2d Cir. 1978), cert. denied, 435 U.S. 995 (1978); Joe v. United States, 510 F.2d 1038, 1042 (10th Cir. 1975); United States ex rel. Powell v. Pennsylvania, 294 F. Supp. 849, 852 (E.D.Pa. 1968), appeal dismissed, 425 F.2d 267 (3d Cir. 1970).

Indeed, it is settled in federal practice that a defendant is entitled to a charge on available lesser included offenses at his request, if there is evidence to support the charge. 8A Moore's Federal Practice ¶ 31.03[1] at 31-15 (2d ed., Sept. 1978 revision).

been so startling that it can only be described as a veritible march to death row. During the first 33 months of the law's operation, Alabama prosecutors attained a 96 percent conviction rate in capital cases where the defendant pled not guilty and an 86 percent death sentence rate where the jury rendered a verdict of guilty and the issue of punishment was contested. These statistics deviate starkly from the expected norm found by the Supreme Court in Woodson v. North Carolina, 428 U.S. 280, 295 n.31 (1976)(Opinion of Steward, Powell, and Stevens, JJ.) (hereinafter "Joint Opinion"): "Data compiled on discretionary jury sentencing of persons convicted of capital murder reveal that the penalty of death is generally imposed in less than 20 percent of the cases." Although the wholly alien results achieved under the Alabama statute do not, standing alone, compel the invalidation of the statute, the do highlight the constitutionally unacceptable manner in which the statute must be working and underscore the need to overturn it.[5/]

2. The Equal Protection Violation.

Of all Alabama's criminal defendants, only those charged with a capital offense are denied the protection of a lesser included offense instruction. Consequently, capital defendants must defend not simply their liberty, but their very lives, without an important procedural safeguard afforded every other Alabama defendant -- a safeguard integral to fostering jury faithfulness to the standard of proof beyond a reasonable doubt. The lesser offense preclusion of Alabama's death penalty statute thus infringes upon two rights: the right to life and the right to unprejudiced jury fact-finding on the issue of guilt.

5/ Alabama's preclusion of jury consideration of lesser included offenses also deprives a capital defendant of the right to trial by jury guaranteed him by the fourteenth amendment's due process clause. Duncan v. Louisiana, 391 U.S. 145 (1968). Where a legislature recognizes that different degrees of criminality -- and different punishments -- should attach to the same basic act (here the killing of another human being), and that those differences turn on factual determinations, the power to determine that the facts warrant conviction only of a lesser offense cannot, without the defendant's approval, be taken from the jury.

Both of these rights are "fundamental;" that is, they are explicitly or implicitly guaranteed by the Constitution." San Antonio Indpdt. School District v. Rodriquez, 411 U.S. 1, 33-34 (1973). The right of all persons to life is explicitly guaranteed in the fifth and fourteenth amendments. The right of an accused to unprejudiced jury fact-finding is implicit in the due process clause. In re Winship, 397 U.S. 358 (1970); Cf. Keeble v. United States, 412 U.S. 205 (1973).

Because of its discriminatory impact on these fundamental rights, Alabama's capital punishment statute must be strictly scrutinized to determine whether it is "necessary to promote a compelling governmental interest." Shapiro v. Thompson, 394 U.S. 618, 634 (1969). See also Zablocki v. Redhail, 434 U. S. 374, 388 (1978); Dunn v. Blumstein, 405 U.S. 330, 338-343 (1972); Lindsey v. Normet, 405 U.S. 56, 73 (1972).

The only interest that Alabama has asserted in support of the statute's preclusion of lesser offense instructions is the need to comply with the Supreme Court's ruling in Furman by controlling undue jury discretion and nullification in capital cases.[6/] This objective is insufficient to sustain the law. Gregg and its companion cases squarely held that the concerns Furman expressed for consistent capital sentencing could be satisfied by capital punishment statutes that permit juries to consider lesser included offenses.[7/] The death penalty laws of Georgia, Florida and Texas upheld in those cases clearly demonstrate that there is a "less restrictive means" available to meet Alabama's objective of having a capital sentencing structure that is consistent with the Constitution. See Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Zablocki v. Redhail, 434 U.S. 374, 388, (1978). Accordingly, Alabama's preclusion of lesser included offense verdicts only in capital cases violates the Equal Protection Clause.

6/ Respondent's Brief in Opposition to a Petition for a Writ of Certiorari, Jacobs v. Alabama, No. 78-5696 (October Term, 1978), at 24.

7/ Gregg v. Georgia, 428 U.S. 153, 163 , 199 (1976)(Opinion of Stewart, Powell and Stevens, JJ.)(hereinafter Joint Opinion); Proffitt v. Florida, 428 U.S. 242, 254 (1976)(Opinion of Stewart, Powell and Stevens, JJ.)(hereinafter Joint Opinion); Jurek v. Texas, 428 U.S. 262, 274 (1976)(Opinion of Stewart, Powell and Stevens, JJ.)(hereinafter Joint Opinion).

3. The Eighth Amendment Violation.

Gregg and its companion cases establish that under the eighth amendment, the constitutionality of the death penalty for murder cannot be evaluated apart from the procedures leading to its imposition. As we have shown, Alabama's practice of barring jury consideration of lesser included offenses in capital cases subverts the fact-finding process and undercuts the standard of proof beyond a reasonable doubt. Far from being inconsequential, these deficiencies have resulted in conviction and death sentence rates that are nothing short of astounding.

The uniqueness of Alabama's lesser offense preclusion is perhaps the most eloquent testimony to its unfairness. Other states were not doubt deterred from incorporating a similar provision into their own capital punishment statutes by their anticipation of the likely response of jurors to it -- an anticipation that Alabama's experience has proved deadly accurate.[8/] Both the avoidance by every other state of the lesser offense preclusion and its unpopularity with jurors are highly significant under the Eighth Amendment, for "legislative enactments and jury determinations" are substantial indicia of "contemporary standards regarding the infliction of [capital] punishment." Woodson v. North Carolina, 428 U.S. 280, 288 (1976)(Joint Opinion).

In contrast with the overwhelming evidence that Alabama's lesser offense preclusion does not comport with "contemporary standards of decency,"[9/] there is virtually no evidence -- and Alabama has offered none -- of societal acceptance of a capital punishment scheme that, like Alabama's, tells juries they must either kill a defendant or set him free. Alabama's statute is thus invalid under the eighth amendment.

8/ Jurors' reaction to this statute is poignantly illustrated in Justice Jones' dissent in Jacobs v. State, 361 So.2d 640 (Ala. 1978), cert. denied, 59 L.Ed. 2d 83 (1979), in which he quotes excerpts from the voir dire of the jury in that case. Id. at 649.

9/ Woodson v. North Carolina, 428 U.S. 280, 294-295 (1976) (Joint Opinion).

4. The Basis for Reviewing the Facial Validity of the Statute.

This Court has firmly adhered to a "traditional rule" in constitutional adjudication, which requires that litigants base their pleas solely on injury to their own rights. The Court has, however, recognized exceptions to this rule. In so doing, it has acted on "the most 'weighty contervailing considerations.'" Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973). Those considerations are present here.

The most significant factor is, of course, that lives hang in the balance.

> [D]eath is a different kind of punishment from any other which may be imposed in this country . . . . From the point of view of the defendant, it is different both in its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 357-358 (1977)(Plurality Opinion). Because of this quantitative and qualitative difference between death and all other punishments, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976)(Joint Opinion). Accordingly, "[w]hen a defendant's life is at stake, the [Supreme] Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187 (1976)(Joint Opinion).

It cannot be said that Alabama's death penalty statute requires every safeguard to be observed. Its defects, as outlined above, are profound. Death penalty defendants are singled out for trial under procedures which "stack the deck" against them, procedures which are subject to challenge on due process, equal protection and eighth amendment grounds. These elements of the statute so undercut the rationality of the sentencing process that they assure that almost any decision can be, or appear to be infected with "caprice or emotion."

Assuming, arguendo, that some individuals sentenced under a statutory scheme as flawed as this one may be sentenced without caprice or emotion, it might be said that the statute, as applied in those cases, should not be overturned. The surface logic of this proposition is belied by the impossibility of identifying which individuals were properly sentenced. Precisely because the statute is so skewed, no reviewing court will ever be able to conclude that a particular defendant's conviction was free of caprice. A reviewing court may decide that a particular defendant could have properly been convicted and sentenced to death, but it will not be able to say that the jury and judge who in fact adjudicated the defendant's case were reasoning in a constitutionally acceptable manner. Surely a conviction which might well have been premised on any one of several theories, one of which is unconstitutional, cannot stand. Every case arising under this statute will be in precisely this posture.

Petitioner does not suggest that a death penalty statute is unconstitutional merely because it is capable of unconstitutional application, for no statute could escape such a proscription. Particularly in this sensitive field, however, it is essential that the courts assure that the statutes under which individuals may be executed are fundamentally sound, in addition to scrutinizing any individual claims of improper application. Broadly speaking, this has been the courts' practice throught this decade's reconsideration of the constitutionality of the death penalty.[10/] This practice should continue, and should entail a consideration by this Court of the facial validity of Alabama's bizarre preclusion of consideration of lesser-included offenses.

10/ The courts have followed this course in other fields as well. See, e.g., Argersinger v. Hamlin, 407 U.S. 25 (1972) (counsel required whenever imprisonment imposed); Miranda v. Arizona, 384 U.S. 436 (1966)(establishing uniform safeguards against violation of fifth amendment rights); cf. Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972)(holding vagrancy statute unconstitutionally vague because of its lack of fair notice and encouragement of "arbitrary and erratic arrests and convictions").

B. The Role Alabama Has Assigned the Jury, Compelling It to Impose a Death Sentence Upon Every Defendant Convicted of a Capital Crime While Precluding It From Considering Mitigating Circumstances, Raises Substantial Questions Under the Eighth and Fourteenth Amendments.

Ala. Code, § 13-11-2(a) (1975), mandates that if the jury finds a defendant charged with any of the enumerated offenses guilty, "it shall fix the punishment at death." (Emphasis added.) The statute thus forces the jury in a capital case to view itself as a sentencing authority and contemplate the enormity of the consequences of a guilty verdict while simultaneously denying the jurors any lawful channel by which to give substance to those considerations that must necessarily affect any rational human being's decision that one of his fellows must live or die. Alabama's expectation that its capital juries can disregard the ostensibly lethal consequences of a guilty verdict in determining guilt or innocence is unconstitutionally unrealistic. Its insistence that its capital juries approve a death sentence they have been statutorily precluded from properly evaluating perpetrates an unconstitutional charade. Quite simply, the Alabama statute encourages the most constitutionally infirm aspect of jury participation in a capital sentencing scheme -- "unguided and unchecked jury discretion," Woodson v. North Carolina, 428 U.S. 280, 302 (1976)(Joint Opinion) -- while denying the jury an opportunity to perform its most constitutionally compelling function in capital cases -- "maintain[ing] a link between contemporary community values and the penal system," Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968). This compounded misuse of the jury violates the eighth and fourteenth amendments.

Prior decisions of this Court repeatedly emphasized the importance of the avoidance of unbridled jury discretion. See Woodson v. North Carolina, 428 U.S. 280, 302 (1976)(Joint Opinion); (Stanislaus) Roberts v. Louisiana, 428 U.S. 325, 334-35 (1976)(Opinion of Stewart, Powell and Stevens, JJ.)(Hereinafter "Joint Opinion"); Furman v. Georgia, 408 U.S. 238, 257

(1972)(Douglas, J., concurring); id. at 310 (Stewart, J., concurring); id. at 313 (White, J., concurring).

As detailed in the joint opinion in Woodson, a review of the history of the administration of capital punishment statutes in this country convincingly establishes that when forced to determine guilt or innocence under a statute that seemingly makes death a necessary consequence of conviction,[11/] American juires "have, with some regularity, disregarded their oaths and refused to convict. . . ." 428 U.S. at 293.

Such juror lawlessness would appear to be inevitable under the Alabama statute since § 13-11-2 compels a jury that has found a defendant guilty of a capital crime "to fix the punishment at death." Faced with the prospect of being required to order the termination of lives they believe should be spared, Alabama juries can be expected to refuse to convict some unquestionably guilty defendants, even if infrequently. Ironically, other juires, as already noted, can be expected to convict defendants whom they do not believe to be guilty of capital murder, so as to avoid their escaping all punishment. The interplay between these two features unquestionably generates the unguided and unchecked jury discretion condemned in Woodson.

The arbitrariness of the jury's actions is aggravated both by the absolute absence of guidelines for its decision, Jacobs v. State, 361 So.2d 640, 643 (Ala. 1978), cert. denied, 59 L.Ed.2d 83 (1979), and by the paucity of information on which the jury must act. Aggravating and mitigating circumstances, under Alabama law, are considered by the trial judge at a post-verdict sentencing hearing. The jury fixes its sentence at death when it decides the accused's guilt. Thus

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11/ Because both federal and state governments have, since the country's inception, provided the opportunity for executive clemency, see Gregg v. Georgia, 428 U.S. 153, 199-200 n.50 (Joint Opinion); Schick v. Reed, 419 U.S. 256 (1974); Spinkellink v. Wainwright, 578 F.2d 582, 617-619 (5th Cir. 1978) cert. denied, 59 L.Ed.2d 796 (1979), it is doubtful that any American capital punishment law has been mandatory in any absolute sence. What is, therefore, crucial in assessing whether a death penalty statute operates in a constitutionally impermissible manner is the jury's perception of the consequences the statute attaches to its decisions.

Alabama, while compelling its juries to place their imprimatur on all capital sentences, requires them to do so on a record often or always lacking "essential . . . information about the individual defendant[s] whose fate [they] must determine." Jurek v. Texas, 428 U.S. 262, 276 (1976)(Opinion of Stewart, Powell, and Stevens, JJ.)(Joint Opinion). The jury's role in sentencing is reduced to an ill-informed and unreviewable exercise of its power to affect sentence by skewing the decision on guilt.

It is no answer to say, as the Alabama Supreme Court has said, that the post-jury-verdict judicial hearing on aggravating and mitigating circumstances remedies this deficiency. Whether Alabama's juries have no real sentencing role at all, as this argument would have it, or have a lawless and arbitrary role, as logic suggests, Alabama's statutory scheme starkly presents the substantial question of the constitutionality of imposing the death penalty without meaningful, lawful participation by the community through the medium of the jury.[12/] Because the eighth amendment's meaning is informed by "the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958), and because juries "express the conscience of the community on the ultimate question of life or death," Witherspoon v. Illinois, 391 U.S. 510, 519 (1968), Alabama's system is, for this reason as well as the others outlined here, unconstitutionally flawed.

The post-jury-verdict judicial hearing, moreover, is far from a meaningful check on the arbitrariness of the jury's sentencing role. The existence of the post-verdict hearing can hardly improve the jury's decisionmaking, since Alabama law makes no provision for informing the capital jury of the trial judge's role in sentencing. If jurors do become aware of the judge's role, their sence of accountability is if anything

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12/ One formulation of this question was included in the grant of certiorari, but not ultimately decided, in Lockett v. Ohio, 438 U.S. 586, 609 n.16 (1978).

likely to be attenuated. The entire sentencing process is thereby made less responsible, not more reliable.

Nor will the judge's review be a reliable safeguard if the jury's decisionmaking has not been adequate. The community pressure on the court not to overturn a jury-fixed sentence of death will be substantial.[13/] The statute itself, moreover, permits the trial court to sentence a capital defendant to life imprisonment without parole only if, "after weighing. . . the fixing of the punishment at death by the jury," the judge "refuse[s] to accept the death penalty as fixed by the jury." Ala. Code, § 13-11-4 (1975). Finally, the trial judge does not review the jury's verdict in any meaningful sense. He has no more capability than his North Carolina and Louisiana counterparts had to "check arbitrary and capricious exercise of [the jury's] power. . . ." Woodson v. North Carolina, 428 U.S. 280, 303 (1976)(Joint Opinion). If the jury votes for death, the trial judge may choose to supersede it; but his choice cannot be made upon the basis of any understanding of its unfathomable verdict. In short, as Justice Jones wrote in dissent in Jacobs v. State, 361 So.2d 640, 650 (Ala. 1978), "the judge's subsequent consideration of mitigating factors cannot rectify the unconstitutionally unreliable sentence already imposed."

C. Alabama's Procedure of Deferring the Trial Judge's Consideration of Aggravating and Mitigating Circumstances Until After the Jury Has Mandatorily Imposed a Sentence of Death Infringes a Capital Defendant's Right to Unprejudiced Sentencing in Violation of the Eighth and Fourteenth Amendments.

It is clear that "in capital cases the fundamental respect for humanity underlying the eighth amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280,

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13/ See Section I.C. infra.

304 (1976). It is also clear that "the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause." Gardner v. Florida, 430 U.S. 349, 358 (1977)(plurality opinion). Any capital sentencing procedure then, must assure "reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, 428 U.S. 280, 305 (1976), and must comport with fundamental fairness, Witherspoon v. Illinois, 391 U.S. 510 (1968). Alabama's sentencing process fails on both counts.

An Alabama trial judge comes to the "constitutionally indispensable part of the process of inflicting the penalty of death" only after a jury verdict has been publicly pronounced -- and publicized -- which sentences the defendant to die without consideration of mitigating circumstnaces. The judge is thus placed in the exposed position of having to override the jury's death sentence, and to take the public heat of "refusing to accept" a death sentence, in order to give the defendant the benefit of the sentencing hearing which is his constitutional due. Such a procedure is equivalent, at the sentencing stage, to beginning a trial on the issue of guilt or innocence by publicly proclaiming that the defendant is guilty and that a trial will not be held to determine whether he should be found guilty.

Indeed, Alabama's death sentencing procedure is worse, because the pre-announced verdict of death carries the imprimatur of a jury of twelve citizens who, in public contemplation, appear to have sat in judgment on the case even though they have not in fact observed federal constitutional standards in fixing the sentence of death -- standards which require that the sentencing agency "consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed," Jurek v. Texas, 428 U.S. 262, 271 (1976)(Joint Opinion). The resultant pressure has already been felt. Justice Jones, in dissent in Jacobs v. State,

361 So.2d 640, 650 (Ala. 1978), took note of the "outcry of unjustified criticism attendant with a trial judge's reduction of a sentence to life imprisonment without possibility of parole, after a jury has returned a sentence of death." See id. at 650-51 n.3.[14/] A procedure which compels the judge to place himself in a publicly unfavorable light in order to do his minimal constitutional duty[15/] is too fraught with peril to be permitted consistently with due process,[16/] and too unreliable to pass eighth amendment muster.

Even if a judge were able and willing to disregard the jury sentence of death, the statute specifically instructs him to consider it. As noted in Section I.B., supra, the trial judge is directed to weigh "the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury," § 13-11-4 (emphasis added). A system which so plainly "stack[s] the deck against" the defendant, Witherspoon v. Illinois, 391 U.S. 510, 523 (1968), results in a distortion of "the balance of forces between the accused and his accuser," Wardius v. Oregon, 412 U.S. 470, 474 (1973). Where the defendant's life is at stake, it also ignores the "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)(plurality opinion).

14/ Alabama judges -- both trial and appellate -- are elected. Ala. Const., Art. 6.13, as amended by Amendment No. 328. They are thus not likely to be completely insensitive to this "outcry." Yet this system's decisions can only be valid where individual judges are able to ignore such criticism. It is disturbing, therefore, that only two judges were responsible for five of the seven cases in which (as of May, 1979) death sentences had been reduced to life imprisonment.

15/ Such a process embroils the judge in the passions of the day and forces him to "assume primary responsibility in chosing between competing political, economic and social pressures." Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring in affirmance of judgment).

16/ Cf. Connally v. Georgia, 429 U.S. 245 (1977); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927). See also Gardner v. Florida, 430 U.S. 349, 403 ("Florida argues that trial judges can be trusted to exercise their discretion in a responsible manner . . . However acceptable that argument might have been before Furman v. Georgia, it is now clearly foreclosed."); Johnson v. Mississippi, 403 U.S. 212 (1971); Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

Because of the pressures brought to bear on the sentencing process, it is essential that the capital defendant be protected at this stage by a proper burden of proof. As Gardner v. Florida, 430 U.S. 349 (1977), and Presnell v. Georgia, 99 S.Ct. 235 (1978), have demonstrated, the "fundmental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." Id. at 236-37. It would seem that the standard of proof beyond a reasonable doubt which In re Winship, Addington v. Texas, and Jackson v. Mississippi have all deemed basic to criminal due process, should accordingly apply in full force to determinations made during the sentencing phase of a capital case.[17/]

Alabama's statute, however, merely requires that a trial judge who fixes the punishment at death list "one or more of the aggravating circumstances . . . which it finds exists," and "[a]ny of the mitigating circumstances . . . which it finds insufficient to outweigh the aggravating circumstances." Ala. Code, § 13-11-4 (1975). The state courts have not construed this statute to require proof beyond a reasonable doubt.[18/] This failure would be a basis for certiorari in its own right, but it is particularly significant in light of the other flaws in the Alabama sentencing process.

17/ The Georgia, Florida and Texas statutes which were upheld by the Supreme Court all require proof of aggravating circumstances beyond a reasonable doubt, either by their own terms or by interpretation of the highest appellate court of the state in questions. See Gregg v. Georgia, 428 U.S. 153, 166 n.9 (Joint Opinion); Jurek v. Texas, 428 U.S. 262, 269 (Joint Opinion); Spinkellink v. Wainwright, 578 F.2d 582, 610 (5th Cir. 1978), cert. denied, ___ U.S. ___ (1979).

18/ The state court decisions addressing the burden of proof qyestion are elusive at best, see, e.g., Kyzer v. State, ___ So.2d ___, 6 Div. 655, manuscript opinion at 13-15 (Ala. Crim. App. August 21, 1979).

D. Alabama's Failure to Provide a System of Comparative Review of Sentences and to Empower Its Appellate Courts to Vacate Death Sentences in Appropriate Cases Raises Substantial Questions Under The Eighth Amendment.

In order to pass constitutional muster, a death penalty sentencing scheme must eliminate the arbitrary and capricious application of the death sentence. An important component of a reliable, and thus constitutionally acceptable sentencing scheme is "prompt judicial review of the [sentencing] decision in a court with state-wide juridiction . . . [as] a means to promote the evenhanded, rational, and consistent imposition of death snetneces under law." Jurek v. Texas, 428 U.S. 262, 276 (1976) (Joint Opinion). This appellate review is constitutionally necessary to "assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants," Gregg v. Georgia, 428 U.S. 153, 204 (1976)(Joint Opinion), and "to ensure that [death sentences] are consistent with other sentences imposed in similar circumstances." Proffitt v. Florida, 428 U.S. 242, 253 (1976)(Joint Opinion).

In its 1976 decisions, this Court observed that in the context of reviewing capital cases, two distinct features of appellate review assume special significance. First, the Court noted with approval that both the Georgia and Florida schemes provided for the comparative review of death sentences to determine "whether the [death] sentence [in each case] is disproportionate compared to those sentences imposed in similar cases," Gregg v. Georgia, 428 U.S. 153, 198 (1976)(Joint Opinion);[19/] Proffitt v. Florida, 428 U.S. 242, 251 (1976) (Joint

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19/ The Georgia appellate scheme for comparative review is extensive. See Gregg v. Georgia, 428 U.S. 153, 166-68 (Joint Opinion); id. at 223-24 (White, J., concurring). The court is required to compare "each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." Id. at 198.

Opinion).[20/] Second, the Court attached constitutional importance to the power of state appellate courts to vacate death sentences in cases where they affirm the conviction. As the Supreme Court noted in Proffitt (428 U.S. at 253):

> The Supreme Court of Florida, like that of Georgia, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, it has vacated 8 of the 21 death sentences that it has reviewed to date.

When the Alabama appellate review system in death cases is measured by these benchmarks, it falls far short of the constitutional standard. The Alabama death statute does not empower Alabama courts to exercise comparative proportional appellate review or to vacate a death sentence in a case where the conviction is fair but where the death sentence imposed is excessive, arbitrary or disproportionate when compared to the sentence in other cases. As the Court of Criminal Appeals noted recently, "this Court does not have the statutory authority to reduce the penalty and resentence the appellant itself." Lewis v. State, 4 Div. 611 (Alabama Court of Criminal Appeals, September 4, 1979).

The Court's statement of its practice was correct, for in over 30 opinions under Alabama's new death penalty statute is has not reduced or vacated any, though in a limited number it has remanded for written factual findings and/or new sentencing hearings. The Alabama Supreme Court similarly has not asserted or exercised a power to reduce or vacate sentence. Without this power, the appellate courts of the state have no effective

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20/ As the Supreme Court noted in Proffitt v. Floirda, 428 U.S. at 258-59 (Joint Opinion), the Florida Supreme Court has adopted, without statutory requirement, a comparative proportionality review similar to that of Georgia. Although the Supreme Court did not allude to any mechanism for the comparative review of death sentences in Jurek, at the time Jurek was decided only two cases had worked their way through the Texas appellate system, Jurek v. Texas, 428 U.S. 262, 270 (Joint Opinion). The Court simply refused to assume that Texas' system of appellate review would work in an unconstitutional manner. In Alabama, on the other hand, the evidence is in. And it does show that Alabama's appellate courts do not engage in comparative review.

means of assuring proportionality of sentences. The opinions of both the Court of Criminal Appeals and the Supreme Court reflect, moreover, that these courts view their role as the correction of error,[21/] rather than a comparative review.

E. The Overall Operation of Alabama's Death Penalty Statute Is So Prejudicial to the Rights of a Capital Defendant at Both the Guilt and Sentencing Stages as to Raise Substantial Questions Under Both the Eighth Amendment's Cruel and Unusual Punishment Clause and the Due Process Clause of the Fourteenth Amendment.

Although the Supreme Court's pronouncements governing the procedures a State must follow before it can constitutionally deprive a citizen of his life "have not ... always been easy to decipher," Lockett v. Ohio, 438 U.S. 586, 602 (1978)(plurality opinion), one principle has remained unchanged, unchallenged and impregnable: "[T]he decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." Witherspoon v. Illinois, 391 U.S. 510, 520-22 n.20 (1968). In enacting the death penalty statute challenged here, Alabama has not fulfilled its obligation to keep the scales of justice true. Instead, with a hand that grows increasingly heavy at each successive stage of a capital case, Alabama plunges the balance -- and the defendant whose life is dependent upon it -- toward death. Each of the constitutional flaws described above compoinds the effect of the others. The result is that neither trial jury nor trial judge, nor the appellate courts, is an effective bulwark against the irrational application of the death penalty.

For those defendants a prosecutor decides to charge with a capital crime, the Alabama death penalty statute is a veritable engine of death which flies in the face of settled constitutional principles. This Court should review this patently unconstitutional scheme.

21/ See, e. g., Cade v. State, 4 Div. 640, Manuscript Opinion at 43 (Ala. Cr. App. November 21, 1978).

II. The Decision Below, Finding No Error in the Trial Judge's Failure to Charge on the Elements of Robbery, Decides a Substantial Federal Question in a Manner Inconsistent With the Applicable Decisions of this Court.

Under Alabama law, a defendant may not plead guilty to a capital charge and then be sentenced by a judge. "Only a jury can make a factual determination of guilt and only a jury can fix the punishment at death." Prothro v. State, 570 So.2d 740, 747 (Ala. Cr. App. 1979).

Prior to trial, petitioner attempted to enter a plea of guilty in exchange for a death sentence. (R. 59), but the trial judge, pursuant to state law, empanelled a jury to hear the state's case against petitioner.

The trial, as held, was not an abbreviated proceeding, but rather a full blown trial on the merits of the case. The trial judge conducted extensive voir dire and excused jurors who demonstrated bias. (R. 81; R. 81-94). Both state and defense gave opening and closing statements.

Defendant's counsel made timely objections and extensively cross-examined the state's witnesses. The trial did not proceed as a ratification of petitioner's guilty plea, but rather proceeded, as any other trial, with the submission of the issue of guilt or innocence to the jury. To be sure, petitioner testified as to his involvement and asked that the jury sentence him to death. However, the judge emphasized in this charge that the state was still required to prove each and every element of the charge beyond a reasonable doubt and further cautioned the jury

> You may not take the simple approach and say, if the defendant admits he did it, we go no further.

(R. 223). In his charge, however, he completely omitted any charge on the elements of robbery, even though petitioner was charged with robbery murder.[22/] The jury then found petitioner

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22/ Under Alabama law the elements of robbery are: a) the unconsented taking of the property of another, (b) from his person or his presence, (c) by violence or by putting in fear and, (d) with larcenous intent. E.g., Martin v. State, 5 Ala. App. 405, 286 So.2d 80 (Ala. Crim. App. 1973).

guilty of robbery-murder with no instructions to support such a finding.

By law, petitioner, no matter how outrageous or bizarre his conduct may have been, had to have a jury determine whether he was guilty of the capital offense charged in the indictment and thus whether his punishment should be fixed at death. Ala. Code, § 13-11-2,3 (1975); Prothro v. State, 370 So.2d 740 (Ala. Cr. App. 1979). It is axiomatic that such a jury determination must comport with the dictates of due process. Gardner v. Florida, 430 U.S. 349 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); In re Winship, 397 U.S. 358 (1970). Because that process involves the death penalty, the eighth amendment is also implicated. Woodson v. North Carolina, 420 U.S. 280 (1976).

In petitioner's case, the process for determining whether he should live or die was fatally flawed because the fact finder, the jury, was never charged on an essential element of the crime. The constitutional implications of this failure merit review by this court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Alabama Supreme Court.

Respectfully submitted,

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THE OPINION IN RITTER V. ALABAMA HAS NOT BEEN FILMED. IT CAN BE FOUND AT 375 So. 2d 270.

13-11-1. Limitation on imposition of death penalty or life sentence without parole.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in the cases and in the manner herein enumerated and described in section 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, § 1.)

13-11-2. Aggravated offenses for which death penalty to be imposed; felony-murder doctrine not to be used to supply intent; discharge of defendant upon finding of not guilty; mistrials; reindictment after mistrial.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when

the child victim is intentionally killed by the defendant;

(9) Willful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first or second degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, § 2.)

13-11-3. Hearing as to imposition of death penalty or life sentence without parole after conviction; admissibility of evidence; right of state and defendants to present arguments.

If the jury finds the defendant guilty of one of the

aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, § 3.)

13-11-4. Determination of sentence by court; court not bound by punishment fixed by jury.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, § 4.)

13-11-5. Conviction and sentence to death subject to automatic review.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, § 5.)

13-11-6. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, § 6.)

13-11-7. Mitigating circumstances.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, § 7.)

13-11-8. Appointment of experienced counsel for indigent defendants.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law. (Acts 1975, No. 213, § 8.)

13-11-9. Effective date.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, § 10.)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5741

WAYNE EUGENE RITTER,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION

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The Respondent, State of Alabama, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Supreme Court of Alabama opinion in this case. That opinion is reported at 375 So. 2d 270 (1979).

QUESTIONS PRESENTED

I.

WHETHER THE FAILURE TO INSTRUCT A JURY IN A CAPITAL CASE ON NON-CAPITAL LESSER INCLUDED OFFENSES IS UNCONSTITUTIONAL IF THERE IS ABSOLUTELY NO EVIDENTIARY BASIS TO SUPPORT A VERDICT ON THE LESSER OFFENSES?

II.

WHETHER THE SENTENCING PROCEDURE PROVIDED IN THE ALABAMA CAPITAL PUNISHMENT STATUTE IS CONSTITUTIONAL?

III.

WHETHER ALABAMA PROVIDES FOR COMPARATIVE APPELLATE REVIEW OF SENTENCING IN CAPITAL CASES?

IV.

WHETHER THE ALABAMA CAPITAL PUNISHMENT STATUTE INSOFAR AS IT CONCERNS PROOF OF AGGRAVATING CIRCUMSTANCES IS CONSTITUTIONAL?

V.

WHETHER ALABAMA'S CAPITAL PUNISHMENT STATUTE VIOLATED ANY OF RITTER'S CONSTITUTIONAL RIGHTS IN VIEW OF HIS UNUSUAL COURSE OF CONDUCT AT HIS TRIAL.

VI.

WHETHER THE PETITIONER'S VOLUNTARY AND KNOWING WAIVER OF ERROR IN THE TRIAL COURT'S CHARGE TO THE JURY PRESENTS ANY CONSTITUTIONAL QUESTION FOR REVIEW BY THIS COURT?

STATEMENT OF THE CASE

PROCEEDINGS BELOW

The Petitioner, Wayne Eugene Ritter, was indicted on April 8, 1977 under Alabama's post-Furman Capital punishment statute, Code of Alabama 1975, § 13-11-1, et seq., for the robbery-homicide of Edward A. Nassar, a Mobile, Alabama pawnbroker (R. 20). Petitioner was arraigned in open court on April 18, 1977 at which time he entered a plea of guilty (R. 55 - 62).

Trial commenced on April 26, 1977 (R. 72). At the conclusion of the State's case, the Petitioner took the stand and indicated his desire to plead guilty (R. 207 - 208). The Petitioner then in the presence of the jury admitted his part in the robbery-homicide (R. 218 - 221).

On April 27, 1977 the Court held a post-trial hearing to determine whether the Petitioner would be sentenced to death or sentenced to life imprisonment without parole (R. 229 - 237). The State offered evidence at the hearing of Petitioner's prior convictions through F. B. I. records and Petitioner's sworn testimony (R. 229-234). The Court gave the Petitioner and his attorney an opportunity to present in mitigation any evidence concerning the Petitioner (R. 235 - 237). After conducting the sentencing hearing the trial court made a written finding as to each of the aggravating and mitigating factors under Alabama's capital punishment statute. Code of Alabama 1975, § 13-11-6 and 13-11-7 (R. 243 - 246). The trial court found as a further mitigating factor that Mr. Ritter made no attempt to harm the two young daughters of the victim (R. 246). The Court then

sentenced the Petitioner to death noting that the aggravating circumstances outweighed the mitigating circumstances (R. 246-247).

Petitioner was afforded automatic review of his conviction and sentence in an appeal to the Alabama Court of Criminal Appeals. On October 25, 1977 the Alabama Court of Criminal Appeals affirmed the conviction and sentence imposed on Petitioner. Evans v. State, 361 So. 2d 654 (Ala. Cr. App. 1977). The Court of Criminal Appeals denied Petitioner's application for rehearing on November 15, 1977.

On November 29, 1977 Petitioner filed a petition for writ of certiorari with the Alabama Supreme Court. On December 8, 1977 the Alabama Supreme Court granted the writ. On May 19, 1978 the Alabama Supreme Court reversed and remanded the decision of the Court of Criminal Appeals with respect to Wayne Ritter for the Court of Criminal Appeals to consider the applicability of the "felony-murder doctrine."

On August 9, 1978 the Court of Criminal Appeals again affirmed the conviction and sentence imposed on the Petitioner. Rehearing was denied on August 28, 1978. On July 6, 1979 the Alabama Supreme Court affirmed the conviction and sentence of Wayne Ritter. Rehearing was denied on September 7, 1979.

STATEMENT OF THE FACTS

The events and circumstances involving the robbery and killing of Edward A. Nassar are set out in the opinion of the Court of Criminal Appeals. Evans v. State, 361 So. 2d 654, 655-661 (Ala. Cr. App. 1977). Those events are briefly summarized below.

On January 5, 1977 the Petitioner, Wayne Eugene Ritter, and John Louis Evans drove to Mobile, Alabama from Biloxi, Mississippi (R. 193, 324). They were low on money and were looking for a place to rob (R. 218). They also decided that while they were pulling a robbery they might as well get some guns (R. 218). Once in Mobile they drove around looking for a place to rob (R. 193, 218). They decided upon a pawnshop near Interstate 65 (R. 193, 218). Mrs. Jimmie Tagert identified Wayne Ritter as being one of two men she saw enter Edward Nassar's pawnshop on January 5, 1979 (R. 133).

Once in the store Wayne Ritter asked the clerk, Edward Nassar, to let him see a pistol which Nassar handed him (R. 194, 218). Ritter had some ammunition in his hand and he started loading the pistol (R. 194, 218). While Ritter was doing this, Evans had drawn his pistol (R. 194, 218).

Edward Nassar immediately dropped down behind the counter and started towards his office (R. 194, 219). At this point Nassar was shot by Evans (R. 194, 211, 219). Evans and Ritter had discussed the possibility of having to kill somebody during a robbery and Ritter was standing by to assist Evans in case he missed (R. 220, 221).

Evans and Ritter then left the store, with Ritter still clutching the pistol taken from Nassar (R. 219). John Dueitt made an in court identification of Wayne Ritter as being one of the men he saw leaving Edward Nassar's pawnshop on January 5, 1977 (R. 111). Evans and Ritter remained in Mobile until it was dark and then headed back to Biloxi, Mississippi (R. 194, 219).

Wayne Ritter was arrested by F. B. I. agents in Little Rock, Arkansas on March 7, 1977 (R. 156, 159). Ritter was returned to Mobile where he gave a statement to Sergeant John Phillips of the Mobile Police Department admitting his part in the robbery and murder of Edward Nassar (R. 190 - 194). Wayne Ritter again admitted his part in the robbery and murder of Edward Nassar in testimony at his trial (R. 216 - 221). The Defendants presented no evidence at trial other than their testimony admitting that they robbed and shot to death Edward A. Nassar (R. 210-221).

REASONS WHY THE WRIT SHOULD BE DENIED

SUMMARY OF ARGUMENT

Even if this Court should hold in the Beck case that the preclusion of lesser included non-capital cases is unconstitutional when the evidence in a capital case would support a conviction on such offenses, that decision will not be dispositive of this case. Unlike the Beck case and most other capital cases, there was no evidentiary basis whatsoever for any lesser included offense instructions in this case. The federal rule and the general Alabama rule is that lesser included offenses should be submitted to the jury only when there is a reasonable basis in the evidence upon which a jury could rationally convict of a lesser instead of a greater offense. Such an evidentiary basis exists only if there is a factual dispute about an element essential to the

greater but not lesser offense. Not only was there no such dispute in this case, but every element of the greater offense was admitted and confessed, and there was a valid guilty plea to the greater offense.

The Constitution does not require that lesser included non-caiptal offenses be submitted to a jury in a capital case in which there is no evidentiary basis for them. Gregg v. Georgia, 428 U. S. 153, 160, 161, n. 2, 163, 215-216 (1976), upheld a capital punishment statute under which a trial judge is required to charge lesser included non-capital offenses only when they are supported by the evidence. None of the arguments against precluding lesser included offenses which are supported by the evidence apply to the situation in which there is no evidentiary support for them. Permitting a capital case jury to convict for a lesser included non-capital offense which has no basis in the evidence would only serve to promote jury nullification and the kind of de facto jury discretion which leads to irrational, arbitrary, and capricious sentencing.

The requirement that a jury verdict form convicting a capital defendant "fix the punishment at death" serves to buttress the requirement of proof beyond a reasonable doubt at the guilt stage and does not lead to capriciousness in sentencing. The trial judge and not the jury is the sentencing authority. A capital defendant is sentenced only after a sentence hearing is held where the trial judge considers statutory aggravating and mitigating circumstances and any non-statutory mitigating circumstance relevant to the case. There is no presumption that death is the proper penalty, and the judge reaches the sentencing decision only after weighing the particular aggravating and mitigating circumstances in each individual case. Trial judges

can be trusted to perform their sentencing duties properly, and they have done so.

Capital sentences have been reviewed at the appellate level in two ways - by independent weighing of the aggravating and mitigating circumstances and by comparative review of the sentence with the sentences in other cases. In this case, the Court of Criminal Appeals weighed the aggravating and mitigating circumstances and found the sentence to be proper. This system of appellate review insures that death sentences are not "wantonly" or "freakishly" imposed.

Alabama's statute operates to effectively require proof beyond a reasonable doubt of at least one aggravating circumstance before a death sentence can be imposed. If more is required, Alabama's statute can be interpreted to provide it. In any event, all of the aggravating circumstances considered in this case were proven beyond a reasonable doubt.

The Petitioner knowingly and voluntarily waived any error in the trial courts charge to the jury in the instant case. It is clear that such a waiver of rights is permissible under the United States Constitution.

ARGUMENT

1. THE PRECLUSION OF LESSER INCLUDED OFFENSES WAS NOT UNCONSTITUTIONAL IN THIS PARTICULAR CASE BECAUSE THERE WAS NO EVIDENTIARY BASIS FOR THEM

A. Introduction

The Petitioner argues that the preclusion of lesser included offense charges under Alabama's capital punishment

statute results in the facial invalidity of the statute. The question of whether a sentence of death may constitutionally be imposed after a jury verdict of guilt of a capital offense when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense and when the evidence would have supported such a verdict is presently before this Court. Beck v. Alabama, 365 So. 2d 1006 (Ala. 1978), cert. granted, 26 Cr. L. 4052 (October 9, 1979).

The instant case is distinctly different from the Beck case, supra, in that there was no evidence presented at the trial of Wayne Ritter which would have supported a conviction for a lesser included non-capital offense. It is the position of the State that even if this Court should decide in Beck that it is unconstitutional to preclude a lesser included non-capital offense in a capital case in which there is a factual basis in the evidence for a conviction for that lesser offense, it is not unconstitutional to preclude a conviction for a lesser included offense when as in the instant case there is no evidence presented at the trial of the capital case which would support a conviction for the lesser offense instead of for the capital offense.

B. The Rule in Non-Capital Cases is That a Jury is Permitted to Consider Lesser Included Offenses Only if There is a Factual Basis in the Evidence for Them

(1) The Federal Rule

As this Court held in Sansome v. United States, 380 U. S. 343, 350 (1965), "A lesser included offense instruction is only proper where the charged greater offense required the jury to

find a disputed factual element which is not required for conviction of the lesser included offense." Accord, e. g., United States v. Madden, 525 F. 2d 972, 973 (5th Cir. 1976); United States v. Flint, 534 F. 2d 58, 60 (5th Cir.), cert. denied, 429 U. S. 924 (1976). It is neither necessary nor proper to permit a jury to consider convicting a defendant for a lesser offense unless the jury could rationally find that although all the elements of the higher offense had not been proven all of the elements of the lesser offense had been. E. g., Sansome v. United States, 380 U. S. at 351; Methvin v. United States, 441 F. 2d 584, 586 (5th Cir. 1971), cert. denied, 404 U. S. 839. The case of Keeble v. United States, 412 U. S. 205 (1973), is not to the contrary, because in that case the defendant's intent to create serious bodily harm was "very much in dispute at trial." 412 U. S. at 213. Since that intent was an element of the higher offense but not of the lesser offense, the Court specifically found that the jury "could rationally" have convicted the defendant of the lesser offense instead of the greater one. 412 U. S. at 213. Absent a factual dispute over the existence of an element necessary only to the higher offense, the result is to the contrary. As the Court said in Sansome v. United States, 380 U. S. at 354-355:

> In sum, it is clear here that there was no disputed issues of fact which would justify instructing the jury that it could find that petitioner had committed all the elements of either or both of the [lesser offenses] without having committed a violation of the [higher offense]. This being the case, the petitioner was not entitled to a lesser included offense charge. . . .

The rule described is the rule which prevails in the federal courts, but the same rule generally applies in Alabama courts.

(2) The Rule in Alabama

Under Alabama law, the general rule is that a defendant is not entitled to have the jury consider a lesser included offense unless under a reasonable theory based upon the evidence the defendant could be guilty of the lesser offense instead of the greater one. E. g., Fulgham v. State, 291 Ala. 71, 277 So. 2d 886, 890 (1973) (upholding refusal to instruct on manslaughter in the second degree in a murder case); Kelly v. State, 235 Ala. 5, 176 So. 807, 808 (1937) (upholding refusal to instruct on larceny and assault and battery in a robbery case); Whitehead v. State, 206 Ala. 288, 90 So. 351, 354 (1921) (upholding refusal to instruct on manslaughter in the first degree in a murder case); Golston v. State, 57 Ala. App. 623, 330 So. 2d 446, 449-450 (1975) (upholding refusal to instruct on attempted robbery in a robbery case); Harvest v. State, 342 So. 2d 1369, 1372 (Ala. Cr. App. 1977) (upholding refusal to instruct on petty larceny in a grand larceny case); Harris v. State. 44 Ala. App. 654, 219 So. 2d 410 413 (1969) (upholding refusal to instruct on grand larceny in a robbery case); Bowman v. State, 44 Ala. App. 331, 208 So. 241, 244-245 (1968) (upholding refusal to instruct on lesser included offenses in a robbery case). These cases also establish that where evidence is undisputed, there can be no evidentiary basis

for permitting the jury to consider any lesser included offenses. See, e. g., Harris v. State, 219 So. 2d at 413; Golston v. State, supra.[1]

There is one and only one exception to the rule in Alabama that lesser included offenses are to be submitted to the jury only if there is an evidentiary basis to support them. That exception is contained in Code of Alabama 1975, § 13-1-73 which provides that when a jury convicts a defendant under an indictment for murder in the first degree, the jury must be permitted to determine whether the defendant is guilty of murder in the first or second degree. This special statutory rule, which is an exception to the general rule, means that at the trial of a first degree murder indictment the jury must be instructed on and permitted to convict for second degree murder regardless of whether there is a factual basis in the evidence for that lesser included offense.[2] This special statutory rule applies only to murder indictments and not to capital indictments generally. For example, before Furman v. Georgia, 408 U. S. 238 (1972), robbery was a capital crime in Alabama, Title 14, § 415, Code of Alabama 1940 (Recompiled 1958), yet the Alabama courts repeatedly held that it was not proper to permit a jury to consider lesser included offenses in a robbery case unless there was some evidentiary basis for convicting on them instead of on robbery itself. E. g., Kelly v. State, 235 Ala. 5, 176 So. 807, 808 (1937); Bowman v. State, 44 Ala. App. 331, 208 So. 2d 241, 244-245 (1968).

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[1]This case law has been codified in Code of Alabama 1975, § 13A-1-9(b) (1979 Supp.) which provides that, "The court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense." Section 13A-1-9(b) is part of the new Alabama Criminal Code, adopted in 1977, but applicable only to crimes committed on or after January 1, 1980.

[2]Effective January 1, 1980, Section 13-1-73 is repealed and replaced by Section 13A-1-9(b) of the new Alabama Criminal Code. See n. 1, above.

Even if the clause in Code of Alabama 1975, § 13-11-2(a), which precluded lesser included offenses in capital cases were to be held unconstitutional and severed from the statute, there would still be no state law requirement that the jury in a capital case be permitted to consider lesser included offenses for which there is no basis in the evidence. Section 13-1-73 would not apply, because that statutory provision is limited by its terms to murder indictments. The Alabama Supreme Court has repeatedly held that the capital felonies which are listed in Code of Alabama 1975, § 13-11-2(a) are not crimes of murder and cannot be described or referred to as murder, or capital murder, or even murder under aggravated circumstances. E. g., Clements v. State, 370 So. 2d 723 (Ala. 1979); Watters v. State, 369 So. 2d 1272 (Ala. 1979); Jacobs (John L.) v. State, 371 So. 2d 448 (Ala. 1979). Therefore it follows that if the preclusion of lesser included offenses clause contained in Alabama's capital punishment statute is held to be unconstitutional and is severed from the statute, then the law in Alabama will be that a jury in a capital case is to be in instructed on and permitted to find lesser included non-capital offenses when and only when the evidence provides a factual basis which would support a conviction on the lesser offense instead of on the capital offense.[3]

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[3]If the preclusion of lesser included offenses raised by the evidence is held unconstitutional in Beck v. Alabama, supra, then the question of the severability of the preclusion clause of section 13-11-2(a) will be an issue of Alabama law. E. g., Morey v. Doud, 354 U. S. 457, 470, n. 16 (1957). Of course, whether the United States Constitution requires that a jury in a capital case be allowed to convict on lesser included offenses even if they are not supported by the evidence is a federal issue. That issue is discussed at pp. 12 - 16 of this brief, below.

Therefore, neither Alabama law nor general federal law requires that a jury be permitted to convict on a lesser included offense if there is no factual dispute in the evidence upon which such a conviction can be based. Nor does federal constitutional law require it.

C. The Constitution Does Not Require That a Jury in a Capital Case be Permitted to Consider Non-Capital Lesser Included Offenses for Which There is No Basis in the Evidence

There is a significant difference between preventing a jury in a capital case from considering a lesser included offense supported by the evidence and preventing it from considering a lesser included offence which has no basis in the evidence. That difference was recognized by this Court when it limited its grant of certiorari in Beck v. Alabama, supra, to the constitutionality of not permitting a jury to consider a verdict of guilty on a lesser included non-capital offense "when the evidence would have supported such a verdict."

Under the Georgia capital punishment statute upheld in Gregg v. Georgia, 428 U. S. 153, 163 (1976) "the trial judge is required to charge lesser included offenses when they are supported by any view of the evidence." However, the Georgia statute does not require that lesser included offenses be submitted to the jury if they are not supported "by any view of the evidence." The Gregg case is itself an example. Gregg was charged with murder during the course of a robbery. The trial court charged the jury on felony murder, non-felony murder, and on the lesser included offenses of robbery, but it specifically refused to charge on the lesser included offense of manslaughter. 428 U. S. at 160, 215 - 216. This

Court expressly noted that the Georgia Supreme Court had upheld the trial court's refusal to instruct the jury on voluntary manslaughter, "since there was no evidence to support that verdict." 428 U. S. at 161, n. 2 (opinion of Stewart, Powell, and Stevens, J. J. — hereinafter referred to as "joint opinion"). This Court upheld the Georgia statute and affirmed the judgment of the Georgia Supreme Court. Therefore, Gregg v. Georgia, supra, establishes that it is not unconstitutional in a capital case to prevent a jury from considering lesser included non-capital offenses when there is no evidentiary basis for them.

The Louisiana statute struck down in Roberts (Stanislaus) v. Louisiana, 428 U. S. 325, 330 (1976), provided that capital juries must be instructed on the non-capital lesser included offenses of second degree murder and manslaughter "whether or not raised by the evidence." While this was not the reason the statute was held unconstitutional, 428 U. S. at 336, the Roberts plurality did note that such a requirement "plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate," thereby injecting "an element of capriciousness" and permitting the "arbitrary exercise of the capital jury's de facto sentencing discretion." 428 U. S. at 335 (joint opinion). While the quoted words were spoken in a case involving a mandatory statute, the same concerns exist in regard to the operation of non-mandatory statutes.

This Court has indicated that in order to comply with Furman, capital punishment procedures should not create "a substantial risk that the death penalty would be inflicted in

an arbitrary and capricious manner." Lockett v. Ohio, 438 U. S. 586, 601 (1978) (plurality opinion). Furman requires that sentencing discretion be "directed and limited" so that the death penalty will be imposed in a more "consistent and rational manner" and so that there will be a meaningful basis for distinguishing the cases in which it is imposed from the cases in which it is not imposed. Lockett v. Ohio, supra. Permitting the jury in a capital case to convict for a lesser included non-capital offense which has no basis in the evidence will only serve to promote jury nullification and the kind of de facto sentencing discretion which will cause the death penalty to be inflicted in an arbitrary and capricious manner. Instructing a jury to apply the law and decide the case on the basis of the evidence and then giving them a tool which serves no purpose other than to permit them to disregard the law and evidence is illogical. It does not promote consistent and rational sentencing, but just the opposite. A verdict convicting a defendant of a lesser included offense for which there is no factual basis in the evidence can only be based on caprice or emotion rather than reason. A defendant is not constitutionally entitled to that.

On pages 7 - 9 of Ritter's brief, he argues that the preclusion of lesser included offenses denigrates the proof beyond the reasonable doubts standard by encouraging jurors to convict in spite of it. This argument is explicitly premised upon there being at the trial proof beyond a reasonable doubt of a lesser included offense but not of the capital offense itself. That situation, by definition, does not exist in a case like the present one where there is no factual basis for

a jury to find that the defendant was guilty of a lesser offense but not of the greater capital offense. Nor does Keeble v. United States, 412 U. S. 205 (1973), support a contrary conclusion. As was discussed on p. 8 of this brief, above, in Keeble there was a factual dispute which provided an evidentiary basis for the lesser included offense, and that basis was specifically recognized by this Court.

Likewise, the equal protection analysis on pp. 9 - 10 of Ritter's brief yields an entirely different result when applied to the preclusion of lesser included offenses not supported by the evidence. Not permitting a jury to convict on lesser included offenses not supported by the evidence is the general rule in Alabama and in the federal courts. See pp. 7-12 of this brief, above. It is true that, until January 1, 1980, Alabama has in effect a special statute requiring that regardless of the evidence juries be instructed on second degree murder in the trial of all non-capital first degree murder indictments. See p. 10 of this brief, above. The difference between this rule and the refusal to instruct on lesser included offenses not supported by the evidence in this and other capital cases is justified by the compelling state interest in avoiding jury nullification and promoting consistent, rational and non-arbitrary jury sentencing in capital cases. See pp. 13-14 of this brief, above.

Ritter's Eighth Amendment argument is based upon the "uniqueness" of Alabama's preclusion of factually supported lesser included offenses. The rule precluding jury consideration of lesser included offenses not supported by the evidence is not unique. That is the general rule in non-capital cases in this country, and it is the rule in federal courts. Ritter has not

cited any authority which establishes a different rule in capital cases, and Gregg v. Georgia, supra, is authority to the contrary. See pp. 12-13 of this brief, above.

D. There was no Factual Basis in the Evidence at Ritter's Trial to Support a Conviction on a Lesser Included Non-Capital Offense

(1) The Non-Capital Lesser Offenses Included in the Crime for Which Ritter Was Charged

Under Alabama law, every killing is unlawful unless expressly excused or justified by law. Knight v. State, 50 Ala. App. 39, 276 So. 2d 624 (1973). Every unlawful killing constitutes either a capital crime, first degree murder, second degree murder, first degree manslaughter, or second degree manslaughter.[4] The capital crimes are defined in Code of Alabama 1975, § 13-11-2(a).

Ritter was convicted of the capital felony defined in § 13-11-2(a)(2) which is defined as "Robbery or attempts thereof when the victim is intentionally killed by the defendant." While the state could have averred and proved simply that during the robbery Ritter intentionally killed Nassar, it gratuitously averred that during the robbery Ritter committed murder in the first degree of Nassar.[5]

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[4]Effective January 1, 1980, a new Alabama Criminal Code will go into effect. Code of Alabama 1975, § 13A-1-1 through § 13A-14-5 (1979 Supp.). This new code abolishes the degree of murder and manslaughter and changes the definition of the crimes. Sections 13A-6-3. It also redefines the crime of robbery and divides it into three degrees. Sections 13A-8-41 through 13A-8-43. However, none of the provisions of this new criminal code apply to any crime committed prior to January 1, 1980. Section 13A-1-7. Accordingly, the discussion of lesser included offenses in this brief will be based upon the law applicable to Ritter.

[5]First degree murder is averred in an indictment in Alabama by use of the words, "unlawfully, and with malice aforethought, killed." Code of Alabama 1975, § 15-8-150(72).

In spite of the fact that the statute does not require such an extra averment, many of the capital cases which have reached Alabama's appellate courts have included it, apparently because prosecutors were unsure that a mere averment of intentional killing would suffice. The Alabama Supreme Court has held that while such a practice is not required, it is permitted, but if the indictment avers first degree murder instead of simply an intentional killing then first degree murder must be proven. E. g., Clements v. State, 370 So. 2d 723, 725 (Ala. 1979); Jacobs (John L.) v. State, 371 So. 2d 448, 449 (Ala. 1979).

Accordingly, in Ritter's case there were two elements of his capital crime — robbery and first degree murder of the victim. There are four types or classes of first degree murder in Alabama, and they are defined in Code of Alabama 1975, § 13-1-70. Ritter was charged and convicted, as part of the capital crime, with the first type of first degree murder which is, "any . . . kind of willful, deliberate, malicious and premeditated killing." The willful, deliberate, and premeditated aspects are self-explanatory. Malice must also be present. In Alabama homicide law, malice does not mean hate or ill will, but instead described the mental state or condition which prompts the taking of another's life without legal excuse or justification. E. g., Lowery v. State, 294 Ala. 347, 317 So. 2d 360 (1975); McGuffin v. State, 178 Ala. 40, 59 So. 635 (1912). Unless the circumstances of the killing rebut it, malice is presumed from the use of a deadly weapon such as a pistol. E. g., Smith v. State, 53 Ala. App. 141, 298 So. 2d 71 (1974); Hackman v. State, 41 Ala. App. 642, 644, 148 So. 2d 253 (1962) described as "a long prevailing presumption in the criminal jurisprudence of Alabama").

Murder in the second degree is the unlawful killing of a human being with malice but without premeditation or deliberation. E. g., Miller v. State, 40 So. 47 (Ala. 1906); Cooper v. State, 364 So. 2d 382, 387 (Ala. Cr. App.), cert, denied 364 So. 2d 388 (Ala. 1978). The difference between first degree murder and second degree murder is thus the element of premeditation or deliberation.

Manslaughter in the first degree is the unlawful killing of a human being without premeditation or deliberation and without malice. Code of Alabama 1975, § 13-1-90; Martin v. State, 56 Ala. App. 33, 318 So. 2d 772, cert. denied, 294 Ala. 765, 318 So. 2d 775 (1975); Wilkinson v. State, 50 Ala. App. 150, 277 So. 2d 423, cert. denied, 291 Ala. 802, 277 So. 2d 427 (1973). Thus, the difference between second degree murder and first degree manslaughter is the element of malice. E. g., Hunter v. State, 335 So. 2d 194, 200 (Ala. Cr. App.), cert. denied, 335 So. 2d 203 (Ala. 1976); Morris v. State, 47 Ala. App. 132, 251 So. 2d 629, 633 (1971).

Manslaughter in the second degree, a misdemeanor, is the unlawful killing of a human being without malice and without intent to kill, which killing is committed accidently in the commission of an unlawful act not felonious, or accidently in the improper or negligent performance of a lawful act. E. g., Johnson v. State, 94 Ala. 35, 41, 10 So. 667 (1891); Callahan v. State, 343 So. 2d 551, 554 (Ala. Cr. App. 1977).

Robbery is defined as the felonious taking of money or goods of value from the person of another or in his presence by violence or by putting him in fear. E. g., Golston v. State, 57 Ala. App. 623, 330 So. 2d 446, 450 (1975). Its essential

elements are felonious intent, force or putting in fear as the means of effecting the intent, and by that means, taking and carrying away the property of another from his person or presence. Golston v. State, 330 So. 2d at 450. Robbery includes the lesser offenses of larceny, assault, assault and battery, and attempted robbery. Golston v. State, 330 So. 2d at 449.

(2) The Evidence

The evidence against Ritter is summarized on pp. 2-4 of this brief, above. The evidence establishing each element of the capital offense was a overwhelming as any evidence could ever be. Not only did Ritter confess to the F. B. I., to the Mobile Police Department, and to the grand jury that he had robbed and murdered Edward Nassar, he also took the stand and confessed his participation in the crime. In Ritter's own words "Well, I think there are two considerations. First, we did kill Mr. Nassar. We knew we might have to kill somebody during any robbery. We had discussed it before. If anybody went for a gun, that's what was going to happen. We did kill him, so, really, the only thing you can come back with is the death penalty." (R. 220).

All of the elements of first degree murder and robbery were undisputed. They were established by the state's independent evidence and by Ritter's own confessions and admissions both before trial and during the trial. If any more could conceivably be needed, it is furnished by Ritter's guilty plea. At arraignment, against the advice of his attorneys, Ritter pleaded guilty to the capital offense (R. 55 - 62).

In Alabama, when a capital defendant pleads guilty a jury trial is still required. Prothro v. State, 370 So. 2d 740 (Ala. Cr. App. 1979). Accordingly, in spite of Ritter's guilty plea, he was still tried. At the trial, a copy of his written "Motion to Enter Guilty Plea" was introduced into evidence (R. 207-208, 252, 283-284). The guilty plea was voluntary, and the trial court accepted the guilty plea but made the state put on its case anyway.

In the words of the Alabama Supreme Court in Fulgham v. State, 291 Ala. 71, 277 So. 2d 886, 890 (1973), there was no reasonable theory based upon the evidence under which Ritter could be guilty of a lesser included non-capital offense instead of the capital offense. In the words of Sansome v. United States, 380 U. S. 343, 350-351 (1965), no lesser included offense instruction was proper because the jury was not required to find a disputed factual element required for conviction of the higher offense but not for conviction of a lower offense. There were no disputed factual elements at all. Not only did the evidence establish without dispute all of the elements of the capital offense but Ritter also admitted, confessed, and pleaded guilty to them. In the absence of any disputed issue of fact, the jury could not rationally find Ritter guilty of a lesser included non-capital offense instead of the capital offense itself. Sansome, v. United States, 380 U. S. at 351. Finally, in the words used by the Supreme Court in Gregg v. Georgia, 428 U. S. 153, 161, n. 2 (1976) (joint opinion), the trial court was not required to permit the jury to return a verdict of guilty on a lesser included non-capital offense, "since there was no evidence to support that verdict."

E. Ritter has No Standing to Attack the Validity of the Preclusion of Jury Consideration of Lesser Included Offenses Under Alabama's Capital Punishment Statute

Because Ritter was not constitutionally entitled to any lesser included offense instruction in view of the evidence at his trial, the failure to give such an instruction was not a violation of his constitutional rights. While Ritter purports to attack the facial validity of Alabama's statute, he cites no cases which establish that he may challenge the validity of a statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations. Broadrick v. Oklahoma, 413 U. S. 601, 610 (1973). In Broadrick this Court specifically stated that except in First Amendment areas, "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." And in Dobbert v. Florida, 432 U. S. 282, 300, 301 (1977) where the petitioner was attacking the constitutionality, under the ex post facto clause of the Constitution, of the imposition of the death penalty under Florida statutes in effect at the time of the petitioner's trial, when the killing occurred at a time when the death penalty was governed by earlier Florida statutes, this Court held, "that petitioner having been sentenced to death, may not complain of burdens attached to the life sentence under the new law which may not have attached to it under the old."

If it were not for the statutory provision in Section 13-11-2(a) precluding the consideration of lesser included non-capital offenses, a jury would be permitted to consider

such lesser offenses only when there was an evidentiary basis for them. See pp. 9-12 of this brief, above. Therefore, the purpose and effect of the statutory provision is to preclude consideration of lesser included non-capital offenses when there is an evidentiary basis for such offenses. Since there was no evidentiary basis for them in Ritter's case, the statutory provision did not make any difference, and therefore it could not have prejudged his constitutional rights in any way. Because its mere existence in the abstract affected neither his trial nor his sentence, he has no standing to challenge its validity.

II. THE ALABAMA SENTENCING PROCEDURE AT THE TRIAL COURT LEVEL IS CONSTITUTIONAL

A. An Overview of the Sentencing Process

Under Code of Alabama 1975, § 13-11-2(a) and (c) the jury trying a capital case has three alternatives: 1) it can acquit the denfendant of the capital crime with which he is charged; 2) it can convict the defendant of the capital crime with a verdict form which "fix[es] the punishment at death,"; or, 3) it can fail to agree "on a verdict of guilty or not guilty or on the fixing of the penalty of death." If the jury acquits the defendant, he is discharged. If the jury convicts the defendant and "fix[es]" his punishment at death, the trial court judge then holds a sentence hearing to determine whether the defendant will be sentenced to death or to life without parole. Sections 13-11-3 and 13-11-4. If the jury fails to agree on a verdict of guilty or not guilty or on "the fixing

of the penalty at death" in the verdict form, then a mistrial results. After a mistrial, the defendant can be tried again for the capital offense or he can be re-indicted and tried for a non-capital offense.

The jury is not the sentencing authority. Under § 13-11-4, the judge performs that function. As the Alabama Supreme Court noted in Jacobs v. State, 361 So. 2d 640, 644 (Ala. 1978), cert. denied, 439 S. Ct. 1122 (1979):

> Alabama's sentencing scheme is similar to that in Florida, in that a jury verdict is a necessary step in the scheme but the jury is not the sentencing authority in either Florida or Alabama.

Accord, Beck v. State, 365 So. 2d 985, 1001 (1978), aff'd, 365 So. 2d 1006 (Ala. 1978), cert. granted _____ U. S. _____.

Even though the jury is not the sentencing authority, the requirement that any guilty verdict it returns "fix the punishment at death" serves a very important function. In Gardner v. Florida, 430 U. S. 349, 357-358 (1977) (plurality opinion), Woodson v. North Carolina, 428 U. S. at 305 (plurality opinion), and Gregg v. Georgia, 428 U. S. at 187 (joint opinion), this Court recognized that for constitutional purposes death is a punishment unlike any other. Because of the profound difference between death and any other punishment, greater reliability is necessary. See Lockett v. Ohio, 438 U. S. 586, 604 (1978). In a capital case, a procedural device is constitutionally valuable if it helps to insure that jurors vote to convict only those defendants whose guilt the jurors are truly convinced of beyond any reasonable doubt and to a moral certainty.

The best way to insure that jurors are aware of their awesome task and its terrible responsibilities in determining guilt in a capital case is to confront them with it. That is what the statutory provision accomplishes when it requires the jury to phrase a guilty verdict in terms of the punishment of death, even though the jury is not the sentencing authority. Any capital sentencing system is which the jury is tempted to "pass the buck" to the judge runs the risk that guilt adjudication will not be as reliable as possible. Under Alabama's system, the jury is reminded that the "buck stops here" and it thereby has more reason to realize its awesome responsibility and to discharge it with care.

If the defendant is convicted by the jury, the sentencing process then begins. Under Section 13-11-3, the trial court judge holds a separate sentence hearing for the purpose of determining the appropriate punishment for that particular defendant in that specific case. The statute states that the purpose of this sentence hearing is, ". . . to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole." Id. The Alabama Court of Criminal Appeals in reversing and remanding a capital case for a new sentence hearing in Willie Lewis Mack v. State, 375 So. 2d 476, 500-501 (Ala. Cr. App. 1978), aff'd, 375 So. 2d 504 (Ala. 1979), described the sentence hearing required under Alabama's statute as follows:

> The sentencing hearing is one of the most important and critical stages under Alabama's death penalty law. The guilt stage has passed. Now an experienced trial judge must consider the particularized circumstances surrounding the offense and the offender and determine if the accused is to die or be sentenced to life imprisonment without parole. It is a due

> process hearing of the highest magnitude and the exclusionary rules of evidence play no part. The trial evidence must be reviewed to determine all of the aggravating circumstances leading up to and culminating in the death of the victim and then all the mitigating circumstances must be considered in determining if any outweigh the aggravating circumstances so found in the trial court's findings of fact. Unless and until this is done "the trial judge cannot fairly weigh the aggravating and mitigating circumstances, and the appellate court cannot adequately review his sentencing decision."

At the sentence hearing, the trial court judge weighs the aggravating and mitigating circumstances which are relevant to the case and the individual defendant before him. The statutory aggravating and mitigating circumstances are set out in Sections 13-11-6 and 13-11-7. With one minor difference, they are identical to the statutory aggravating and mitigating circumstances contained in the Florida statute which was upheld in Proffitt v. Florida, 428 U. S. at 248, n. 6 (1976). In addition, unlike the Ohio statute struck down in Lockett v. Ohio, 438 U. S. 586 (1978), the Alabama statute does not limit the trial judge's consideration of mitigating circumstances to those enumerated in the statute. Instead, Section 13-11-3 expressly provides that, "In the hearing evidence may be presented as to any matter that the court deems relevant to sentence . . . ." The Alabama appellate courts have repeatedly held that the statute provides for the consideration of non-statutory mitigating circumstances. E. g., Cooke v. State, 369 So. 2d 1251, 1256 (1979); Jacobs (Jerry Wayne) v. State,

361 So. 2d at 652-654 (1978). In the present case the trial court found, that the only statutory mitigating circumstance was Wayne Ritter's age. The trial court further found that a non-statutory mitigating circumstance existed. The Court found the following:

> (h) The Court finds further another mitigating circumstance, although not set out as such in Section 7 of said Act 213, to be the fact that Mr. Ritter made no effort or attempt to harm the two young daughters of Edward A. Nassar, deceased, who were in his immediate presence at the time of the commission of the Capital Felony or any of the other witnesses in the vicinity. (R. 246)

In the words of Lockett, 438 U. S. at 602, 604, the Alabama statute thus provides for "individualized sentencing" and the trial court judge as the sentencing authority is not "precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis in original, footnote omitted.)

As is discussed on pp. 35-45 of this brief, below, the sentencing process is not complete until after appeal, because the Alabama appellate courts have and exercise the authority to review sentencing decisions.

B. Alabama's Statute is Not Contrary to the Holdings of the Woodson and Roberts Cases

In Woodson v. North Carolina, 428 U. S. 280 (1976), Roberts (Stanislaus) v. Louisiana, 428 U. S. 325 (1976), and Roberts (Harry) v. Louisiana, 431 U. S. 633 (1977), the Court held that mandatory death penalty statutes were

unconstitutional. The reasons given were three. First, it was held that to impose the death penalty on every person convicted of a capital offense, or even a particular type of capital offense, was contrary to contemporary societal standards. Woodson v. North Carolina, 480 U. S. at 332-333 (plurality opinion). Alabama's statute does not rul afoul of this holding, because it does not impose the death penalty on every defendant convicted of a capital offense.

The second reason why the North Carolina and Louisiana statutes were struck down is because the plurality held that with mandatory statutes, there was a:

> failure to provide a constitutionally tolerable response to Furman's rejection of unbridled jury discretion in the imposition of capital sentences. Central to the limited holding in Furman was the conviction that the vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth Amendments. . . . Woodson v. North Carolina, 428 U. S. at 302 (plurality opinion).

Mandatory statutes, according to the plurality, "have simply papered over the problem of unguided and unchecked jury discretion." 428 U. S. at 302. The problems of unguided and unchecked jury discretion were specified in the three concurring opinions which constituted the holding in Furman. In Furman, Mr. Justice White observed that under the pre-Furman statutes the death penalty had been imposed with "great infrequency" and that there was "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not." 408 U. S. at 313. Mr. Justice Douglas stated that the imposition of the death penalty had been "pregnant with discrimination." 408 U. S. at 257. Mr. Justice Stewart specified that the sentence

of death had been "wantonly" and "freakishly" imposed. 408 U. S. at 310. The problems which the Woodson plurality feared with mandatory statutes were jury nullification through refusals to convict and the exercise of de facto sentencing discretion through the exercise of the jury's power to convict on lesser included offenses. The plurality noted that, "American juries have persistently refused to convict a significant portion of persons charged with first degree murder of that offense under mandatory death penalty statutes." 428 U. S. at 302. It observed that refusals to convict of the capital offense had occurred, "quite frequently." 428 U. S. at 302. It also characterized the evidence of jury nullification as "impressive." 428 U. S. at 293, n. 29.

Because a jury which convicts a capital defendant under Alabama's statute is required to use a verdict form which "fix[es] the punishment at death," Ritter argues on p. 15 of his brief that "some Alabama juries may acquit guilty capital defendants they believe do not deserve to die." From this speculation, it is apparently supposed to follow that de facto sentencing discretion and jury nullification will lead to the kind of unconstitutionally capricious and arbitrary sentencing results which were noted in Furman, Woodson, and the Roberts cases.

De facto jury discretion exists when a jury can evade imposition of the death penalty on a defendant by the simple expedient of convicting him of a lesser included offense. Roberts (Stanislaus) v. Louisiana, 428 U. S. at 334-335. The North Carolina, the Louisiana, and the pre-Furman statutes

permitted the exercise of de facto jury discretion through conviction for lesser included offenses. Indeed, Louisiana's statute invited it by requiring that juries be instructed on lesser included offenses even when the evidence would not support such an instruction. Roberts (Stanislaus) v. Louisiana, 428 U. S. at 334-335. Alabama's statute neither invites nor permits de facto jury discretion, because it precludes lesser included offenses.

Jury nullification occurs when a jury acquits a guilty capital defendant because it does not think he deserves the death penalty. The offenses made punishable by death under Alabama's statute are very narrowly defined to include only the most serious crimes committed by the most dangerous criminals. Before a guilty capital defendant can be acquitted through jury nullification under Alabama's statute, twelve jurors who believe beyond a reasonable doubt that he was a dangerous criminal who had committed a very serious crime would have to unanimously agree to acquit him merely because they disagreed with the death penalty. There is no evidence that frequent jury nullification has occurred under the operation of Alabama's statute. Certainly, there is no "impressive" evidence of frequent jury nullification like that relied upon in Woodson. Nor is there any real prospect that such jury nullification will occur in the future.

C. Jury Input Into the Sentencing Decision is Not Constitutionally Required

On p. 16 of his brief, Ritter argues that the Constitution mandates that a jury have significant input into

the sentencing decision in capital cases. No authority supports that proposition. In Proffitt v. Florida, 428 U. S. 242, 252 (1976) (opinion of Stewart, Powell, and Stevens, J. J. — hereinafter referred to as "joint opinion"), it was noted that:

> The basic difference between the Florida system and the Georgia system is that in Florida the sentence is determined by the trial judge rather than by the jury. This Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illinois, 391 U. S. 510, 519 n. 15, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases. (Emphasis added.)

Accord, Lockett v. Ohio, 438 U. S. at 633 (dissenting opinion of Rehnquist, J.); Richmond v. Arizona, 434 U. S. 1323 (1977) (opinion of Rehnquist, J., as Circuit Justice); see also, Beck v. State, 365 So. 2d at 1001. Therefore, four Justices of the Supreme Court have expressed their opinion that jury sentencing is not constitutionally required in capital cases. No member of this Court has ever suggested to the contrary. See also, State v. Simants, 197 Neb. 549, 250 N. W. 2d 881, 887 (Neb. 1977), where the Nebraska Supreme Court upheld that State's capital punishment statute against the contention that it was unconstitutional because of "the lack of jury involvement in the sentencing procedure."

Witherspoon v. Illinois, 391 U. S. 510 (1968), does not require jury input into sentencing in capital cases. Instead, the Witherspoon decision requires that selection of

the sentencing authority in a capital case be impartial and not biased to exclude those who have scruples against capital punishment. Applied to the sentencing procedure used under the Alabama statute, the Witherspoon decision means that the state cannot confine the responsibility for sentencing decisions in capital cases to only those trial court judges who personally favor capital punishment. Of course, the Alabama statute makes no effort to do that, and it therefore does not run afoul of Witherspoon. Any language in Witherspoon even arguably implying jury input should be read in the context of the pre-Furman era of which it was a part. Since that language was spoken, Furman and the post-Furman cases have recognized and emphasized the constitutional importance of consistency in capital sentencing, and the jury sentencing undermines that consistency.

The Proffitt joint opinion noted, 428 U. S. at 252, "that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury. . . ." While recognizing that problem inherent in jury sentencing might be alleviated to some extent by certain procedural adjustments, the same three Justices noted in Gregg v. Georgia, 428 U. S. at 192, that:

> Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. See American Bar Association Project on Standards for Criminal Justice Sentencing Alternative and Procedures. §1.1(b), Commentary, pp. 46-47 (approved Draft 1968); President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society, Task Force Report: the Courts 26 (1967). To the extent that this problem is inderent in jury sentencing, it may not be totally correctable. . . .

Four other justices recognized that even with the particular jury sentencing scheme approved in Gregg, there is still a danger of freakish and infrequent imposition of capital punishment, the very thing condemned in Furman. See, Roberts (Stanislaus) v. Louisiana, 428 U. S. 325 (1976) (dissenting opinion by White, Jr. joined by Burger, C. J., Blackmun, J., J. and Rehnquist, J.). Jury sentencing also endangers the value of appellate review of sentencing decisions, which was thought so constitutionally noteworthy in Gregg and Proffitt. Woodson v. North Carolina, 428 U. S. at 318 (dissenting opinion of Rhenquist, Jr.). Therefore, seven Justices have explicitly recognized the problems which jury sentencing in capital cases pose for the constitutionally valuable goal of even-handed and consistent sentences.

At the very least, the choice between jury sentencing and judicial sentencing in capital cases is one of those types of decisions which are properly within the province of legislative bodies. See, Gregg v. Georgia, 428 U. S. at 174-176 (1976) (joint opinion); Roberts (Stanislaus) v. Louisiana, 428 U. S. at 355-357, 363 (dissenting opinion of White, Jr., joined by Burger, C. J., Blackmun, J., and Rehnquist, J.).

D. The Sentencing Procedure Under Alabama's Statute is Reliable

On pp. 17 - 20 of Ritter's brief, he argues that the sentencing procedure under Alabama's statute is constitutionally unreliable because the trial judge holds a sentence hearing and makes the sentencing determination only after the jury has returned a verdict of guilty which "fixes the punishment at

death." The function of that jury verdict form is discussed on pp. 22 - 24 of this brief, above, and the sentencing procedure under Alabama's statute is discussed on pp. 22 - 26 of this brief, above. The judge and not the jury is the sentencing authority. There is no presumption in favor of a sentence of death, and the judge arrives at his sentencing decision only after a full, fair, and complete hearing into the aggravating and mitigating circumstances applicable to the particular defendant before him. In spite of all this, Ritter argues, in effect, that trial court judges cannot be trusted to exercise their sentencing function properly because to impose a sentence of life without parole instead of death puts a judge "in a publicly unfavorable light."

Ritter relies heavily on a passage from the dissenting opinion of Justice Jones in Jacobs (Jerry Wayne) v. State, 361 So. 2d at 650. Three things should be noted about those comments of Justice Jones. First, his comments were based on the public "outcry" that resulted from the sentence of life imprisoment without parole which was imposed in the case of Tony Randolph Nolen v. State, ___ So. 2d _____ (Ala. Cr. App. 1979). Justice Jones himself was careful to note that he was not "speaking to the merits of the case, or the propriety of the trial judge's action in the particular setting." 361 So. 2d at 650, n. 3. Indeed, he wasn't. When the Court of Criminal Appeals reviewed the "merits" of the Nolen case on appeal, it was forced to note that, "The criminal act for which the defendant was convicted is a horrifying and discouraging comment on the degree of inhumanity to which some men sink." Tony Randolph Nolen v. State, supra, Ms. Op. at 5. Even though Alabama's appellate courts have no power to increase

a sentence of life without parole to death, the sentencing decision made by the trial judge in the Nolen case was so questionable that one appellate judge on reviewing the case felt compelled to comment, "This was a dastardly act and the appellant should have been sentenced to die for the offense." Ms. Op. at 6 (special concurring opinion of DeCarlo, J.). Since the merits of the sentencing decision in the Nolen case caused an "outcry" at the appellate court level, there is no wonder that the same case caused a similar reaction by the public. The Constitution does not require that judges be immune from criticism, either from the public or from other judges, when they make a bad decision in either a capital or a non-capital case.

The second thing to note about Justice Jones' comments in Jacobs, upon which Ritter places so much reliance, is that those comments were answered by the majority on rehearing in that case. See, 361 So. 2d at 654.

The third thing to note about Justice Jones' comments is that the actual operation of Alabama's statute has not borne out his expectations. As of May 14, 1979, there had been nine (9) separate cases in which a defendant was sentenced to life without parole after having been convicted by a jury following a plea of not guilty. [6]

The fundamental assumption of Ritter's argument is that trial court judges cannot be trusted to properly perform their sentencing function. That assumption is closely akin to the

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[6] In addition, there had been thirteen (13) other cases in which a defendant had received a sentence of life without parole as a result of a guilty plea and recommendation from the district attorney. Of course, district attorneys are much more likely to plea bargain and recommend life without parole in cases which are less deserving of the death penalty.

argument that prosecutors cannot be expected to exercise their prosecutorial and plea bargaining powers in a responsible manner. That argument has been rejected by six Justices of this Court no fewer than three times each. See, Gregg v. Georgia, 428 U. S. at 199 (joint opinion); Id. at 224-225 (concurring opinion of White, J., joined by Burger, C. J. and Rhenquist, J.); Proffitt v. Florida, 428 U. S. at 254 (joint opinion); Id. at 261 (concurring opinion of White, J., joined by Burger, C. J., and Rehnquist, J.). Jurek v. Texas, 428 U. S. at 274 (opinion of Stewart, Powell, and Stevens, J. J.); Id. at 278-279 (concurring opinion of White, J., joined by Burger, C. J., and Rehnquist, J.). Judges should not be considered less trustworthy or less responsible than prosecutors.

Finally, Ritter's argument ignores the appellate review of capital sentencing decisions which exists in Alabama.

III. ALABAMA DOES PROVIDE APPELLATE REVIEW OF CAPITAL SENTENCES

Ritter's argument that Alabama's statute does not provide for appellate review of sentencing decisions misses the mark for two reasons. First, it ignores § 13-11-5 which clearly states:

> The judgment of conviction and sentence of death shall be subject to automatic review as now required by law (Emphasis added.)

Secondly, there is no constitutional requirement that appellate review of sentencing decisions be authorized by statutory as opposed to case law. As Ritter himself notes in footnote 20 on p. 22 of his brief, the Florida system of appellate review

upheld in Proffitt was not required by the statute but was instead adopted by the Florida Supreme Court as a matter of case law.

Alabama does have a careful system of appellate review of death sentences which insures that the death penalty will not be inflicted arbitrarily or capriciously. As the Alabama Court of Criminal Appeals recognized in Mack v. State, 375 So. 2d 476, 500-501 (Ala. Cr. App. 1978), aff'd, 375 So. 2d 504 (Ala. 1979), the purpose of the requirement in § 13-11-4 that the trial court enter written findings of fact concerning aggravating and mitigating circumstances is to make appellate review of the sentencing decision possible. In reversing and remanding that case because the trial court did not enter "complete written findings as to the aggravating and mitigating circumstances," the Court of Criminal Appeals said, 375 So. 2d at 501:

> Unless and until this is done, "the trial judge cannot fairly weigh the aggravating and mitigating circumstances, and the appellate court cannot adequately review his sentencing decision." (Emphasis added.)

Accord, Herbert Lee Richardson v. State, _____ So. 2d _____ (Ala. Cr. App. 1978), aff'd, ____ So. 2d _____ (Ala. 1979); Jacobs v. State, 361 So. 2d 640, 646-647 (Ala. 1978) (separate opinion by Torbert, C. J.). As Chief Justice Torbert has also noted, in regard to the requirement for mandatory appellate review, "This mandatory review guarantees that, before a defendant can be executed in Alabama, the sentence of death must be found to be appropriate by both the Court of Criminal Appeals and this Court after a review of aggravating and mitigating circumstances found in the case by the trial judge."

361 So. 2d at 647 (Emphasis added). As the Court of Criminal Appeals explained in Beck v. State, 365 So. 2d at 1000:

> Under the new Alabama death penalty statute, the defendant has a second chance for life with the trial judge, a third with Court of Criminal Appeals, and a fourth with the Supreme Court of Alabama. Not only are decisions of the trial judge in death cases reviewed to insure a fair and impartial trial, but they will insure a consistency and uniformity of sentencing.

Appellate review of the substantive sentencing decision itself in cases in which the death penalty has been imposed is performed in two ways in Alabama — independent appellate weighing of the aggravating and mitigating circumstances to determine the appropriateness of the sentence and comparative review at the appellate level of the sentence with others which have been reviewed in similar cases. An example of a recent case in which the independent weighing of aggravating and mitigating circumstances at the appellate level was expressly revealed in the opinion is Thomas v. State, 373 So. 2d 1149, 1160 (Ala. Cr. App.), aff'd, 373 So. 2d 1167 (1979), where the Court of Criminal Appeals noted:

> The trial judge in his order noted the aggravating circumstances, which were here averred and proved at trial, and also determined by the trial judge in the postsentencing hearing, as required by law. Additionally, this Court has carefully weighed the aggravating and mitigating circumstances independently.
>
> We are of the opinion that the punishment here imposed fits the crime for which the appellant has been found duly guilty. (emphasis in original) (footnotes omitted)

Another example is Beck v. State, 365 So. 2d at 1005, where the appellate court stated:

> We have also considered the mitigating and aggravating circumstances and have found that under the facts of this case, death was the appropriate penalty.

The appropriateness of the sentence of death in view of all the facts and circumstances was also noted in Herbert Lee Richardson v. State, supra, Ms. Op. at 39-40. Indeed, in reviewing Ritter's own appeal, the Alabama Court of Criminal Appeals expressly noted that it had independently reviewed the appropriateness of the sentence. Evans v. State, 361 So. 2d at 662 ("In addition, this Court has weighed the aggravating and mitigating circumstances independently . . . and is of the opinion that the punishment here imposed fits the crime for which each appellant has been found guilty thereof.") In Neal v. State, 372 So. 2d 1331, 1347 (Ala. Cr. App.) (opinion of Bowen, Jr.), cert. denied, 372 So. 2d 1348 (Ala. 1979), Judge Bowen explained that, "this court must independently weigh the aggravating and mitigating circumstances to determine whether they are sufficient to support a sentence of death." No member of the Alabama Court of Criminal Appeals and no member of the Alabama Supreme Court has ever expressed any doubt about this or made any suggestion to the contrary.

In approving Florida's system of appellate review in Proffitt the court said, 428 U. S. at 259-260 (joint opinion):

> If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law. As in Georgia, this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed. . . .

In the words of Proffitt, Alabama's system of independently weighing the aggravating and mitigating circumstances on appeal "can assure consistency, fairness, and rationality in the evenhanded operation of the state law," because independent sentencing review by appellate courts of "statewide jurisdiction" will insure that sentences of death are not "wantonly" or "freakishly" imposed. Indeed, if anything, Alabama's system of appellate review is superior to Georgia's, because Georgia juries give no reasons for their sentencing decisions which can be reviewed at the appellate level. See, Woodson v. North Carolina, 428 U. S. at 318 (dissenting opinion of Rehnquist, J.). In Alabama, on the other hand, the sentencing authority is the trial judge and he is required to specify the aggravating and mitigating circumstances upon which his decision is based, and those factors are considered and weighed independently at the appellate court level.

In addition to independently weighing the aggravating and mitigating circumstances on appeal, the Alabama appellate courts also exercise comparative appellate review of capital sentences. Jacobs v. State, 361 So. 2d 607 (Ala. Cr. App. 1977), aff'd, 361 So. 2d 640 (Ala. 1978), was the first case under Alabama's post-Furman statute to reach the appellate level. Since there were no other cases under the new act with which to compare the death sentence in that case, Alabama's appellate courts compared it ot sentences in pre-Furman cases under Alabama's old capital punishment statute. This practice was expressly recognized in Gregg v. Georgia, 428 U. S. at 204,

n. 56 (1976) (joint opinion), as necessary and appropriate at the inception of a new statute. In Jacobs, 361 So. 2d at 632-633, the Alabama Court of Criminal Appeals noted:

> This is the first case under Alabama's new Death Penalty law to reach appellate review and unlike Georgia, Florida, and Texas we have no other cases with which we can compare the sentencing procedure to assure the consistency in the sentencing process. But that is not to say that we are without standards and guidelines to follow.
>
> . . . .
>
> Since the adoption of the Automatic Appeal Act in 1943 the Supreme Court of Alabama has reviewed approximately ninety-five death cases and has reversed twenty-five of them for various reasons, including excessive punishment, and where the verdict was contrary to the great preponderance of the evidence. Easley v. State, 246 Ala. 359, 20 So. 2d 519; Davis v. State, 245 Ala. 589, 18 So. 2d 282.

The Alabama Supreme Court in performing its comparative appellate review function in that same case noted, 361 So. 2d at 644, that:

> The Court of Criminal Appeals has spelled out specifically how death sentences, reviewed under Alabama's automatic appeal statute, have been reversed and the causes remanded for new trials. This Court has carefully reviewed each point raised by the accused in his petition, which was granted as a matter of right because of the sentence of death. We are familiar with other cases reviewed by this Court in the last decade involving death sentences and we are convinced that the sentence here was not arbitrarily or capriciously entered . . . .

Accord, Clements v. State, 370 So. 2d 708, 712-713 (Ala. Cr. App. 1978), rev'd on other grounds, 370 So. 2d 723 (Ala. 1979) (expressly rejecting the contention that Alabama's system did not provide for comparative appellate review of sentences).

Since the time of Jacobs, supra, more capital cases have reached the appellate level. This has made possible a comparison of the sentence under review with other sentences which have been reviewed under the same statute. An example of a case in which this comparative appellate review was explicitly performed in an appellate opinion is Beck v. State, supra, where the Alabama Court of Criminal Appeals held, 365 So. 2d at 1005:

> We have also considered the mitigating and aggravating circumstances and have found that under the facts of this case, death was the appropriate penalty.
>
> The facts in this case, after a careful evaluation, show a marked similarity with those in Jacobs v. State, supra.
>
> It seems to us that the result is inescapable that the punishment, too, should be the same.

It is true that Alabama appellate courts have not explicitly compared the circumstances of each capital case reviewed by them with the circumstances of other capital cases, but neither had the Florida appellate court at the time of Proffitt. See, Proffitt v. Florida, 428 U. S. at 259 (joint opinion) (noting that the Florida Supreme Court had performed comparative appellate review "several times"). Instead, the usual method of reviewing death sentences in Florida, as in Alabama, was by independent weighing of the aggravating and mitigating circumstances at the appellate level. See, Proffitt v. Florida, 428 U. S. at 253 (joint opinion).

It is also true that if a defendant elects not to appeal a sentence of life without parole that sentence and the facts underlying it will not formally come to the attention of the Alabama appellate courts for purposes of serving as an input for the process of comparative appellate review. However, although

appeal in life without parole cases is not automatic, it is available as a matter of right and many such cases are reviewed. E. g., Neal v. State, supra; Youngblood v. State, 372 So. 2d 34 (Ala. Cr. App. 1979); Evans (Leslie) v. State, 362 So. 2d 1284 (Ala. Cr. App. 1978); Prothro v. State, 370 So. 2d 740 (Ala. Cr. App. 1979); Tony Randolph Nolen v. State, _____ So. 2d _____ (Ala. Cr. App. 1979). In addition, it has never been held that a system of appellate review is defective if the comparative appellate review pool does not contain all capital cases in which a sentence of death was not imposed. Whether the proportionality review conducted by the Supreme Court of Georgia is "based solely upon capital sentences imposed, or upon all sentences imposed in cases where a capital sentence could have been imposed by law" is subject to "some disagreement." Woodson v. North Carolina, 428 U. S. at 317-318 (dissenting opinion of Rehnquist, J.). In addition, it was held in Proffitt v. Florida, 428 U. S. at 259, n. 16 (joint opinion), that even if the Florida Supreme Court did not review sentences of life imprisonment in capital cases and therefore might arguably have an "unbalanced view" of sentencing practices, "this problem is not sufficient to raise a serious risk that the state capital-sentencing system will result in arbitrary and capricious imposition of the death penalty."

Ritter argues based upon Tommy Lewis v. State, _____ So. 2d _____ (Ala. Cr. App. 1979), that Alabama appellate courts do not have the authority to vacate a death sentence and impose a sentence of life without parole themselves, and that that is a matter of constitutional concern. At most, the Lewis case establishes only that the procedure whereby the Alabama appellate courts revise a death sentence is by remand to the trial court

with orders to make a new sentence determination. In Lewis, a defendant was convicted of an intentional killing during the course of a robbery and sentenced to death. On appeal, after weighing the aggravating and mitigating circumstances independently, the Court of Criminal Appeals determined that the trial judge should not have sentenced the defendant to death. One judge thought that the appellate court should modify the sentence itself, while the other four were of the opinion that as a procedural matter the case should be remanded to the trial judge with a mandate to proceed to another sentencing determination. In reversing and remanding the trial court, the majority stated:

> As pointed out in Judge Clark's opinion, the death penalty is not sustained by the evidence presented at the hearing on aggravating and mitigating circumstances. However, this court does not have statutory authority to reduce the penalty and re-sentence the appellant itself. That duty is vested in the trial court, § 13-11-4, Code of Alabama 1975, subject to our review on appeal. "The judgment of conviction and sentence of death shall be subject to automatic review as now required by law." § 13-11-5, Code of Alabama 1975. Ms. Op. at 2 (Emphasis in opinion)

Upon remand, the trial court conducted another sentence hearing at which essentially the same evidence was considered, and then it imposed a sentence of life without parole. In doing so, the trial court noted that the Court of Criminal Appeals had concluded that the aggravating and mitigating circumstances, "require life imprisonment of Lewis without parole," and it quoted the parts of the appellate court's opinion which said that the sentence should not be death. Then the trial court stated as follows:

> The directions given the trial judge as the sentencing authority by the Alabama Court of Criminal Appeals in reversing the

> death sentence of Lewis are more than adequate to enable him to weigh the aggravating circumstances against the mitigating circumstances. The judgment rendered by this Court is founded upon the directions of The Alabama Court of Appeals that the sentence of death would not be sustained on evidence essentially the same as before the Court on the first sentencing hearing; the conclusion of this Court that the evidence now before the Court is essentially the same in nature which has been declared inadequate to sustain a sentence of death by The Alabama Court of Criminal Appeals; the aggravating circumstances; the mitigating circumstances found to exist by The Alabama Court of Criminal Appeals; and the mandate to this Court by The Alabama Court of Criminal Appeals recersing the sentence of death for the sum-normality of the mind of Lewis. (Emphasis added.)[7]

Whether the procedure followed by the four judges of the Court of Criminal Appeals in Lewis is correct or whether that court should have saved time by revising the sentence itself is a point which has not been decided by the Alabama Supreme Court. In any event, it does not matter. At most, the issue of who makes the formal entry that actually changes a sentence of death to one of life without parole is a procedural quibble. The important thing is that the sentence is changed from death to life without parole because the appellate court determined that the death sentence is not proper in the particular case.

The procedural issue does not in any way cloud the authority of the Alabama appellate courts to review the propriety of death sentences. This authority was re-asserted recently by the Alabama Supreme Court in State v. Debra Bracewell, ____ So. 2d _____ (Ala. 1979). In that case,

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[7]From the November 13, 1979 sentencing order of the Circuit Court of Coffee County in State v. Tommy Lewis (Coffee County Case No. CC 77-25).

the Court of Criminal Appeals has reversed the capital conviction on a confession issue and it had not reached any of the other issues in the appeal. In reversing the Court of Criminal Appeals on the confession issue, the Alabama Supreme Court, Ms. Op. at 3, added:

> Upon remand of this cause, the Court of Criminal Appeals is instructed to further review the entire record of the proceedings below, including the propriety of the sentence of death. (Emphasis added)

In summary, the Alabama appellate courts do review the propriety of capital sentences, and in the words of Gregg, they do so "under a system that does not create a substantial risk of arbitrariness or caprice." 428 U. S. at 203.

IV. ALABAMA'S STATUTE OPERATES TO REQUIRE PROOF BEYOND A REASONABLE DOUBT OF AT LEAST ONE AGGRAVATING CIRCUMSTANCE AND ALL THE AGGRAVATING CIRCUMSTANCES CONSIDERED IN THIS CASE WERE PROVEN BEYOND A REASONABLE DOUBT

On p. 20 of his brief, Ritter argues that the Constitution requires that any aggravating circumstance considered in a capital sentencing decision be proven beyond a reasonable doubt. He cites no authority that has so held. In cases like Spinkellink v. Wainwright, 578 F. 2d 582, 610 (5th Cir. 1978), and State v. Simants, 197 Neb. 549, 250 N. W. 2d 881, 888 (1977), the issue was not reached because the statute involved was interpreted to avoid it.

Assuming for purposes of argument that an aggravating circumstance must be proven beyond a reasonable doubt, Alabama's statute meets that requirement. While Alabama's statute does not have an express provision explicitly requiring proof beyond a reasonable doubt of aggravating circumstances, neither did

the Florida statute upheld by this Court in Proffitt v. Florida, 428 U. S. 242 (1976), and by the Fifth Circuit Court of Appeals in Spinkellink v. Wainwright, 578 F. 2d at 610, or the Nebrasks statute upheld in State v. Simants, 250 N. W. 2d at 888. Proffitt, Spinkellink, and Simants all establish that it is the operation and interpretation of the statute, not just its words, that is the proper inquiry.

The structure of Alabama's statute operates, as did the Florida statute examined in Proffitt v. Florida, supra, to require proof beyond a reasonable doubt of an aggravating circumstance before the death penalty may be imposed. Under Code of Alabama 1975, § 13-11-4(1), unless at least one aggravating circumstance is established the death penalty cannot be imposed. Jacobs (Jerry Wayne) v. State, 361 So. 2d at 631 ("If the trial judge in his written findings, determines that one or more of the aggravating circumstances attended the offense charged, then, and only then, can he impose the death sentence.") The state can and often will prove more than one aggravating circumstance, but it must prove at least one or there will automatically be a sentence of life without parole.

Because the definitions of the substantive capital offenses in Section 13-11-2(a) overlap almost completely with the list of aggravating circumstances in Section 13-11-6, the state must in virtually every case prove beyond a reasonable doubt and to a moral certainty at least one aggravating circumstance in order to get a conviction. For example, in proving a defendant guilty beyond a reasonable doubt and to a moral certainty of an intentional killing during the course of a robbery, which is a capital offense under Section 13-11-2 (a)(2), the state will also have proven beyond a reasonable

doubt and to a moral certainty that the capital felony was committed while the defendant was engaged in a robbery, which is an aggravating circumstance under Section 13-11-6(4). The statute itself recognizes this by providing in Section 13-11-4 that the court must set forth as the basis for the sentence imposed, "findings of fact from the trial and the sentence hearing." The same is true of the remaining capital offenses defined in the statute. If the state does not prove them beyond a reasonable doubt, then there will be an acquittal. If the state does prove any of them sufficiently to obtain a conviction that same proof will establish at least one and sometimes more than one aggravating circumstance beyond a reasonable doubt. It is conceivable that one could strain the imagination and conjure up a theoretically possible case in which there is not a factual overlap between the definition of the capital offense proven and at least one of the aggravating circumstances, but this Court's determination should be based on reality rather than on conjecture and speculation.

It is true that in some cases after the sentence hearing is held the trial judge will find and consider aggravating circumstances in addition to those which are proved beyond a reasonable doubt during the trial as a necessary part of the state's case for conviction of the capital crime. Ritter contends that those additional aggravating circumstances should also be proven beyond a reasonable doubt and that therefore the Alabama statute should be struck down. This argument has three major defects.

First, no case has held that all of the aggravating circumstances considered by the sentencing authority, as opposed to at least one of them, must be proven beyond a reasonable doubt.

Second, even if the constitution does require that every aggravating circumstance considered by the sentencing authority be proven beyond a reasonable doubt, Alabama's statute can be so interpreted. While the statute does not contain an express requirement to that effect, neither did the Florida statute upheld in Proffitt. The Alabama Supreme Court has not held that all mitigating circumstances considered by the trial judge must be proven beyond a reasonable doubt, but it has not held to the contrary either. The issue has not been addressed by it, but construing statutes to avoid constitutional issues is a principle of statutory construction which is well recognized by the Alabama Supreme Court. See, e. g., Pruett v. Patton, 288 Ala. 710, 265 So. 2d 130, 133 (1972); Ex parte Hughley Water System, 282 Ala. 633, 213 So. 2d 799, 805 (Ala. 1968). This case did not raise the issue because the trial judge in fact applied such a standard and all of the aggravating circumstances he found and considered were not only proven beyond a reasonable doubt but were undisputed, admitted, and confessed.

That is the third reason for rejecting Ritter's argument on this issue. The trial judge in fact applied a beyond a reasonable doubt or even higher standard of proof to ascertainment of the aggravating circumstances. That is evident from his refusal to find as an aggravating circumstance

that the crime was, in the words of Section 13-11-6(8), "especially heinous, atrocious, or cruel." The trial judge noted:

> While in the personal opinion of the Court, the Capital Felony was especially heinous or atrocious the Court has no precedent or authority which would allow it to hold as a matter of law that this Capital Felony meets the test of being especially heinous or atrocious or cruel, as set out in Section (h) of Section 6 of Act 213, and so the Court makes no finding on this point. (R. 244-245) (Emphasis added.)

Therefore, the trial judge did not find or consider that particular aggravating circumstance in reaching his sentencing decision, because he could not convince himself of it sufficiently to hold that it existed "as a matter of law", a burden of persuasion which is if anything even higher than beyond a reasonable doubt. In addition, the aggravating circumstances which were found and considered by the trial judge were proven beyond a reasonable doubt. In fact, they were undisputed, confessed, and admitted by Ritter at every available opportunity. Accordingly, as the Nebraska Supreme Court held in Simants, 250 N. W. 2d at 888, "That question is not involved in this case because the aggravating circumstances found to exist here were clearly found to exist beyond a reasonable doubt."

In summary, Alabama's statute like Florida's operates to effectively require proof beyond a reasonable doubt of at least one aggravating circumstance before the death penalty can be imposed. If more is consitutionally required, the Alabama statute can be interpreted to provide it. In any event, the aggravating circumstances considered in the sentence hearing in this case were not only proven beyond a reasonable doubt but were undisputed, admitted, and confessed by Ritter.

V. THE OVERALL OPERATION OF ALABAMA'S STATUTE IS NOT UNCONSTITUTIONAL AND IT DID NOT OPERATE TO PREJUDICE RITTER IN ANY WAY

Apparently feeling that the whole is different from the sum of its parts, Ritter argues that the overall operation of Alabama's capital punishment statute is unconstitutional. That argument should be rejected for the same reasons that Ritter's arguments against the individual parts of the statute should be rejected. In considering Ritter's statement that the Alabama statute is a "veritable engine of death," this Court should be mindful of the Statement of Facts in this brief. If there was any "engine" at work in obtaining the death sentence for Ritter, that engine was relentlessly driven by Ritter himself. Against the persistent advice of his attorneys and even of the trial court, Ritter repeatedly confessed and admitted the charges against him and pleaded guilty at every available opportunity. He insisted to the grand jury, to the trial jury, and to the judge sitting as the sentencing authority that he preferred a sentence of death. Ritter has even made that boast at various stages of other appellate litigation involving his case. Having obtained what he so earnestly sought and so richly deserves, it is hardly appropriate for Ritter to blame the result on Alabama's statute.

VI. THE PETITIONER KNOWINGLY AND VOLUNTARILY WAIVED ANY ERRORS IN THE COURT'S CHARGE TO THE JURY

The petitioner argues that the constitutional implication of the trial court's failure to charge the jury as to the elements of robbery in the instant case so fatally flawed the determination of guilt by the jury as to merit review by this Court. The respondent would take exception with this view for a variety of reasons.

First of all it is apparent from the record in this case that Wayne Ritter knowingly and voluntarily waived any errors in the Court's charge. The petitioner was represented by counsel throughout the proceedings and despite the warnings of his counsel and in fact over his counsel's objection the petitioner insisted upon pleading guilty and assisting the state throughout the proceedings. (R. 48 - 61, 207 - 208, 216 - 222).

Prior to his arraignment in the instant case the petitioner filed a "motion of intent to enter guilty plea." (R. 21) Among the grounds asserted in this motion was "that the defendant has openly and publicly admitted his guilt after being advised of his constitutional rights numerous times, and still admits his guilt as charged in both indictments." (R. 21).

At the time he was arraigned the peitioner after being fully advised of his rights under both the United States Constitution and state law entered a plea of guilty. (R. 48 - 61) The trial judge did not accept the guilty plea but as is required by Alabama law set the matter for presentation to the jury. (R. 60 - 61)

At the trial of the case the State presented its case in considerable detail and showed each of the elements of robbery. (R. 97 - 106, 108 - 113, 115 - 120, 124 - 128, 131 - 133, 156 - 162, 184 - 187, 190 - 194, 196 - 199). The petitioner then took the stand and admitted the robbery and murder and testified concerning the details of the robbery and murder. (R. 216 - 222)

It is thus clear that for whatever reason Wayne Ritter had decided to admit his participation in the crime with which he was charged and to assist the State in the presentation of it's case. The petitioner had clearly decided against the advice of counsel to waive all those constitutional rights to which he was entitled. Thus there can be no other conclusion than that the petitioner in not objecting to the Court's charge to the jury was knowingly and voluntarily waiving any errors in that charge.

That such a waiver of rights can occur is not open to question. Defendants when entering guilty pleas are regularly allowed to waive the entire panoply of constitutional rights. The petitioner attempted to do just that by entering a plea of guilty.

The Alabama Supreme Court specifically found that there was a knowing and voluntary waiver of any error in the trial court's oral charge. Ritter v. State, 375 So. 2d 270, 275-276 (Ala. 1979) Such a knowing and voluntary waiver of rights does not present a ground for review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief in Opposition for a Writ of Certiorari to the Supreme Court of Alabama on the Attorney for Petitioner, Honorable John L. Carroll, by depositing the same in the United States Postal Service, duly stamped and addressed as follows:

Honorable John L. Carroll
1001 South Hull Street
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DONE on this the 31 date of December, 19 79.

Jack M. Curtis
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